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INDEX
TO THE
EXECUTIVE DOCUMENTS

OF THE
HOUSE OF REPRESENTATIVES

FOR THE
FIRST SESSION OF THE FORTY-SEVENTH CONGRESS,

1881-'82.



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DECISIONS

OF THE

FIRST COMPTROLLER

IN THE

DEPARTMENT OF THE TREASURY OF THE UNITED STATES.

By WILLIAM LAWRENCE,
FIRST COMPTROLLER.

VOL. II.—SECOND EDITION.
1881.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1882.

DECISIONS OF THE FIRST COMPTROLLER OF THE
TREASURY.

LETTER

FROM

THE SECRETARY OF THE TREASURY,

TRANSMITTING THE

Decisions of the First Comptroller for the years 1881 and 1882.

JUNE 23, 1882.—Laid on the table and ordered to be printed.

TREASURY DEPARTMENT,

Office of the Secretary,

Washington, D. C., June 22, 1882.

SIR: I have the honor to transmit herewith copies of decisions of the First Comptroller of this Department, for the year 1881 and for the year 1882, this day presented to me by that officer, with his letter of the 21st instant, also herewith transmitted.

Very respectfully,

CHAS. J. FOLGER,

Secretary.

Hon. J. WARREN KEIFER,

Speaker of the House of Representatives.

TREASURY DEPARTMENT,

First Comptroller's Office,

Washington, D. C., June 21, 1882.

SIR: On the 10th of February, 1881, I had the honor to transmit to the Secretary of the Treasury a limited portion of the decisions I made during the year 1880, which I supposed might be of some general utility, and on the same day he transmitted them to the Speaker of the

House of Representatives, and they were by that body ordered to be printed.

I now have the honor to transmit to you a portion of my decisions, which I suppose to be of the same general character, for the year 1881, and a similar portion for the year 1882. If the same course should be taken with these as with those of 1880, they would in the course of printing be revised in this office, and additional cases be supplied for 1882, and perhaps some additional matter added, so far as deemed of utility.

Very respectfully,

WM. LAWRENCE,

Comptroller.

Hon. CHARLES J. FOLGER,

Secretary of the Treasury.

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INTRODUCTION.

This volume contains such of the decisions made in the year 1881 by the First Comptroller, in the Department of the Treasury of the United States, as have been deemed of a "general character and sufficiently important to justify" publication. Two editions of the volume have been printed, the first under requisitions made in the Treasury Department upon the Public Printer, and the second and revised edition under an order of the House of Representatives.*

The preparation and revision of the cases decided have required great labor and care. An effort has been made generally to support questions decided by a reference to authorities so far as practicable. Many of the questions requiring the decision of the First Comptroller rest on principles adopted and sanctioned by courts in general judicial proceedings. Some of these principles rest on reasons wholly inapplicable to the Government, and not at all adapted to the practice and proceedings in the Executive Departments, or to the exercise of authority and jurisdiction of officers of the United States. The publication of the decisions of the First Comptroller may be of some service in presenting principles of general application, as well as those peculiar to the Executive Departments and officers.

The pressure of official duties of the Comptroller was such that he was unable to examine the index to this volume, or that of the decisions in the preceding volume, until after they were printed. They were prepared by Thomas Robinson, esq., of this office.

TREASURY DEPARTMENT,

First Comptroller's Office, September 1, 1882.

* The order included a few cases only, decided in 1882. As to these, the order was practically superseded by the joint resolution of Congress, approved August 3, 1882, requiring the Public Printer to print not more than one volume each year of the Decisions and Opinions of the First Comptroller. These cases will, therefore, be included in the third volume of the decisions, which will embrace others, and all for the year 1882 deemed of sufficient importance to justify publication.

DECISIONS

OF

THE FIRST COMPTROLLER (WILLIAM LAWRENCE) IN THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES.

1881.

IN THE MATTER OF THE RIGHT TO HOLD TWO CLERKSHIPS IN THE INTERIOR DEPARTMENT, AND RECEIVE THE SALARY IN FULL OF ONE AND IN PART OF THE OTHER.—EVANS'S CASE.

1. A fourth-class clerk in the Interior Department, having a salary fixed by law, cannot be paid a sum in addition "for services in recording and filing contracts" in the Returns Office, created by the act of June 2, 1862, now section 512 of the Revised Statutes. This result arises from the Revised Statutes, sections 170, 1764, 1765, and from the act of June 20, 1874, (18 Stats., 101, 109, sec. 3.)
2. When a disbursing clerk renders an account for the *payment of salaries*, he cannot in *such* account have credit for moneys paid for "*services*" which do not pertain to the offices for which Congress has appropriated fixed salaries.
3. Appropriations for the payment of *salaries*, as usually made in appropriation acts, can be applied, as a general rule, only to pay public officers the salaries prescribed by law for the performance of official duties.
4. When one clerk in a Department performs the duties of another clerk, no compensation can be made for the performance of such duties beyond the salary provided by law for the office of clerk which he holds. (Rev. Stats., 1764; 15 Op. Att-Gen., 30.)
5. A clerk who, *as such*, is entitled to payment of a salary fixed by law, cannot be paid for "*services* in recording and filing contracts in the Returns Office, per act of June 2, 1862," (Rev. Stats., 512,) although he holds the office of a first-class clerk, to which he was appointed under that act to perform such services.
6. A person who holds an appointment as a fourth-class clerk, and *also* as a first-class clerk, is generally entitled to the *salary* fixed by law for both offices.
7. An officer is, *primâ facie*, entitled to the payment of the salary authorized by law for his office.
8. The head of a Department cannot reduce a salary fixed by law, or stipulate that the services of an officer shall be performed for a less sum than that so fixed. The power to do so would, in effect, be a power to modify the law.
9. An officer entitled to a salary cannot be paid unless there be an appropriation available for the purpose.
10. The usage as to a "lapse fund" stated.

H. Ex. Doc. 219—1

11. An officer may relinquish his right to *salary* by refusing to perform the duties of his office, or by stipulating to perform the duties as unofficial services for a sum less than the prescribed salary, even though such service and stipulation be illegal and can give him no right to the sum stipulated for.

Richard Joseph, the disbursing clerk in the Interior Department, in July, 1880, filed his accounts with the First Auditor in the Department of the Treasury for adjustment for the second quarter of the calendar year 1880, being the fourth quarter of the fiscal year 1880. (Rev. Stats., 440; 20 Stats., 198; 21 Stats., 23, 230.) Among the items for which he asks credit is the following.

"THE UNITED STATES,

To GEORGE W. EVANS, DR.

"1880.

"June 30. To services rendered from July 1, 1879, to June 30, 1880, in recording and filing contracts in the Returns Office, per act of June 2, 1862.....\$200

"Approved:

"C. SCHURZ, *Secretary*.

"Charge 'Salaries, Secretary's Office.'

"Received, at Washington, D. C., June 30, 1880, of R. Joseph, disbursing clerk, Department of the Interior, two hundred dollars, in full of the above account.

"GEO. W. EVANS."

The account filed by the disbursing clerk has a caption as follows:

"The United States, in account with Richard Joseph, disbursing clerk, for the month ending June 30, 1880, under the appropriation for *Salaries, Secretary's Office, 1880.*"

The First Auditor, in adjusting the account, disallowed the voucher referred to, upon the ground that Evans was, during all the year 1880, a fourth-class clerk in the office of the Secretary of the Interior.

The papers were referred, August 23, 1880, to the First Comptroller to decide whether the balance due the United States of \$226.49, as stated by the First Auditor, should be certified, or whether the disbursing clerk should have credit on the voucher for the \$200.

The appropriation for salaries of Secretary's Office in the Interior Department included, besides others, those for "five clerks of class one, one of whom shall be the telegraph-operator of the Department." (20 Stats., 198; 21 Stats., 230.)

The claimant Evans also presents a paper as follows:

"DEPARTMENT OF THE INTERIOR,

"Washington, D. C., January 4, 1881.

"I, C. Schurz, Secretary of the Interior, do hereby certify that George W. Evans was the returns clerk of this Department for the fiscal year

ending June 30, 1880, and as such he was required by law to make certificates to accompany copies of contracts and other papers on file in the Returns Office, when called for by the U. S. courts, evidence of which can be found in the U. S. Court of Claims, &c.

"In witness whereof, I have hereunto set my hand and caused the seal of the Department of the Interior to be affixed, the date herein before written.

"C. SCHURZ,
"Secretary of the Interior."

George W. Evans submitted to the First Comptroller a letter dated December 15, 1880, in support of the legality of the payment made to him for services as returns clerk.

After quoting section 1763 of the Revised Statutes, he says, in substance :

The salary of returns clerk is provided for by law. Section 512 of the Revised Statutes provides that the Secretary of the Interior shall appoint a clerk of the first class to attend to the same. This salary has heretofore been paid out of the appropriation for salaries in the office of the Secretary of the Interior. The Secretary of the Interior has not paid the full amount provided for in section 512, for the reason that the amount of work required was not sufficient to justify the payment of \$1,200 per annum. I was appointed to discharge the duties of this office, in addition to those of a fourth-class clerk in the disbursing office. The duties were performed after office-hours, and did not in any way interfere with my duties in the disbursing office. By allowing me the \$200 per annum the Department makes an annual saving of \$1,000.

I invite your attention to the similar case of R. W. C. Mitchell, at that time [a fourth-class clerk, salary \$1,800] in the Interior Department, and who was allowed [by Hon. A. G. Porter, First Comptroller] additional compensation for services as a special United States commissioner in taking testimony for use in the United States Court of Claims. This was supported by an opinion from the Attorney-General. Also the claims of Mary Fuller, for \$200; M. P. Winslow, for \$100; and M. Porter Snell, for \$100; allowed [in August, 1880, by the Deputy First Comptroller] in the settlement of the account current of R. Joseph, disbursing clerk, Department of Interior, for the second quarter 1880, "for services in connection with publishing the Biennial Register," all regular employes of this Department drawing annual salaries. They were allowed this additional compensation for performing extra services in connection with the publication of the Biennial Register. They did not pass through your office by any inadvertence on the part of the accounting clerks of your office, but were properly questioned by your office, and explained by this Department during the time of settlement.

My claim is strengthened by section 512 of Revised Statutes. My combined salaries amount to \$2,000, and come within the provisions of section 1763.

I refer to the several decisions made by your predecessor, Hon. A. G. Porter, relative to claims for additional pay, where the combined amounts did not exceed \$2,500. (And see Herndon case, August 2, 1880, Decisions of Compt., 45.)

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The Revised Statutes contain the following provision, taken from the act of June 2, 1862, (12 Stats., 412, sec. 4:)

"SEC. 512. The Secretary of the Interior shall from time to time provide a proper apartment, to be called the Returns Office, in which he shall cause to be filed the returns of contracts made by the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior, and shall appoint a clerk of the first class to attend to the same." (See also secs. 3744-3747.)

The claimant in this case, Mr. Evans, is a *fourth*-class clerk in the Department of the Interior, having an annual salary of \$1,800. The services for which it is claimed compensation should be allowed in the settlement of the account of the disbursing clerk were performed either (1) as services *outside* of the duties of a fourth-class clerk, and *not* as duties of the first-class clerk appointed under section 512 of the Revised Statutes; or (2) by virtue of an appointment as such first-class clerk while holding *also* the office of fourth-class clerk.

I.—Can the claim be allowed in the first view presented?

Clearly it cannot.

1. In this view it is a sufficient objection to the allowance of the claim *in this account* of the disbursing clerk, that he is asking credit as for *salaries* paid.

In the view now being considered, the item of \$200 in favor of Evans is not for salary, and hence cannot be paid out of an appropriation for *salaries*; and so cannot be credited to the disbursing clerk in an account charging the appropriation for salaries.

Bouvier says a salary "is usually applied to the reward paid to a public officer for the performance of his official duties." (See "Salary.")

It is sometimes applied to other services; but, as used in the appropriation act applicable here, it means the reward to be paid for official services.

Possibly a better definition of a *salary* would be, A sum fixed by law to be paid an officer, as the compensation to which, as such, he is entitled. It is often paid, and lawfully paid, without "the performance of official duties." A person may hold an office, and tender his services, but be denied by an official superior the opportunity to perform them; or, it may happen that, for other reasons, no services are actually required.

2. But this only decides the question as to *this account of the disbursing clerk*.

a. In the view now being considered—that the item of \$200 is for services not rendered technically as a clerk in office—the claim cannot

in any mode be paid, because payment is prohibited by sections 170 and 1765 of the Revised Statutes, and by the act of June 20, 1874, (18 Stats., 101, 109, sec. 3.)

The services for which the payment of \$200 is claimed were not a part of the duties of a fourth-class clerk. They were *other services*, and, in the view now being considered, unofficial, but authorized by law.

In *Converse vs. United States*, (21 How., 473,) it was decided, that a salaried officer, who performs services not connected with his office but (1) authorized "by existing law," (2) for which the compensation is fixed *in amount* by law, and (3) for the payment of which there is an appropriation applicable, may be paid for *such* additional services. In *such* case no *discretion* is left to any officer over the *amount* to be paid.

It was in accordance with this case, that the opinion of the Attorney-General of February 7, 1877, (15 Op., 608,) held that "where the service in question is one required by law, but not of any particular official, and compensation therefor is fixed by competent authority, and is appropriated, the officer who under due authorization performs the service, is entitled to the compensation."

This was a case in which the United States Minister to the Hawaiian Islands, with an annual salary of \$7,500, received compensation as attorney for supervising and taking testimony to be used in the Court of Commissioners of Alabama Claims. The services were authorized by law, an appropriation was made therefor; the law did not fix the amount thereof, but it was fixed by the presiding judge of said court, as expressly authorized by law. (Act June 23, 1874, secs. 4-11; 18 Stats., 246.) This opinion carries the right to double compensation quite far enough.

Whiting's case, as shown in the opinion of the Attorney-General of January 13, 1863, (10 Op., 436,) is a direct authority against the claimant. Whiting was a clerk in the Interior Department, with an annual salary of two thousand dollars. After Congress transferred to the Interior Department the supervision of the Capitol extension and new dome, the Secretary of the Interior appointed Mr. Whiting to take charge of all the correspondence relative to the Capitol extension and new dome, and to keep the files relating to that business, and agreed to pay him five hundred dollars per annum, from the appropriation made for those works. It was held that he could not be paid, in addition to his salary of two thousand dollars, compensation fixed in the discretion of the Secretary of the Interior for services in taking charge of the correspondence and files of the new business of the Department in respect of the extension of the Capitol.

The Attorney-General said of the compensation claimed by Whiting, under the act of March 2, 1861:

"But it was remuneration *fixed by the Secretary of the Interior himself*, in the exercise of what he doubtless deemed a lawful *discretion*, and *it is precisely this discretion which, according to the court, [in Converse vs. U. S., 21 How., 473,] these statutes have forbidden the head of a Department to exercise.* It was perfectly competent for the Secretary of the Interior to employ a person to perform the duties in question, and to agree that he should be paid therefor out of the fund appropriated for the Capitol extension and new dome, the amount which he agreed Mr. Whiting should receive. But since no office was created by law for the performance of those duties, and no remuneration therefor *fixed by law*, it was not competent *for the Secretary* to add them to the other duties of an officer receiving a fixed compensation therefor, *and pay him an additional sum* for performing the additional duties. This is the very thing which these statutes, as construed, not only by the majority of my predecessors, but by the Supreme Court, were passed to prohibit."

(And see Folger vs. U. S., 13 Ct. Cls., 93.)

The case of Mitchell, referred to by the claimant, was this: Mitchell was a commissioner of the Court of Claims, whose appointment was authorized by section 1075 of the Revised Statutes. His compensation as such, consisting of *fees*, was *fixed* in amount by rule of court, as expressly authorized by said section.

He was also a clerk in the Interior Department with an annual salary of \$1,800—the private secretary of the Secretary of the Interior.

He was employed by the Department of Justice to take testimony for the Government in suits in the Court of Claims against the United States. His services as commissioner were rendered in November and December, 1877; the account was approved and sent to the proper disbursing clerk, February 27, 1878. The Assistant Attorney-General gave an opinion (not published) that he was entitled to fees as commissioner, in the course of which he says:

"The provisions for compensation will be found in 1075 and 1085, Revised Statutes, and the fees prescribed for services of commissioners by the court in the 17th rule of the court. Since the foundation of the Department of Justice, Congress has annually appropriated a greater or less amount to be applied, among other things, under the direction of the Attorney-General, to payment of the expense of the defence of the United States in the Court of Claims. Although we believe the non-applicability of the section [1765] is apparent upon examination of it, the conclusion is strongly confirmed, by comparing with it 1763, in which, ten years after the passage of the former statute of 1842, [Rev. Stats., 1765,] Congress proceeds, without reference to it, to deal with the subject of compensation of those who may hold *more than one office*, and to prohibit compensation for services in an additional office where the compensation of one amounts to \$2,500. As the latest expression of the legislative will, this would necessarily take such cases as that in question out of the operation of the former statute, if there was any

reason to believe that they would otherwise be included therein. By necessary inference, *the right of one whose compensation in either office is less than \$2,500 to the lawful compensation of each is conceded by the statute, and such is Mr. Mitchell's case.*"

This puts the right to the double compensation chiefly on the ground that Mitchell held *two offices* and was entitled to the compensation of both. (See Wade's case, 1 Lawrence, Compt. Dec., 302; Collins's case, 15 Ct. Cls., 22; Plurality of Offices case, 10 Op. Att.-Gen., 446.)

The Attorney-General, in his opinion of June 11, 1877, (15 Op., 308,) hereafter cited, held that where one person holds *two offices*, he is entitled to the salary of both, without reference to the amount of salary in either. (See 16 Op., 7.)

These opinions give no sanction to the payment of the claim now made, as for services not connected with the office of a clerk.

The compensation claimed is not "fixed by law"—but by the discretion of the Secretary of the Interior.

b. If Mr. Evans claims compensation for having performed the official duties of *another clerk*, whether authorized by section 512 of the Revised Statutes or otherwise, his claim must be rejected, on the principle stated by the Attorney-General in his opinion of June 11, 1877, (15 Op., 308,) in which it is said of the provisions of sections 1763, 1764, and 1765 of the Revised Statutes:

"The construction which has been given to these statutes (especially in the case of *Converse vs. The United States*, 21 How., 463) is that the intent and effect of *them* is to forbid officers holding one office to receive compensation for the discharge of duties belonging to another, or additional pay, extra allowance, or compensation for such other services or duties where they hold the commission of but a single office, and, by virtue of that office, or in addition to the duties of that office, have assigned to them the duties of *another office*.

"According to that decision, however, if an officer holds two distinct commissions, and thus two distinct offices, he may receive the salary for each. The evil intended to be guarded against by these statutes was not so much plurality of offices as it was additional pay or compensation to an officer holding but one office for performing additional duties, or the duties properly belonging to another. If he actually holds two commissions, and does the duties of two distinct offices, he may receive the salary which has been appropriated to each office." (And see Herndon's case, 1 Lawrence, Compt. Dec., 51; Bender's case, *Id.*, 317; Wade's case, *Id.*, 302; Clerk's case, *Id.*, 305; *U. S. vs. White*, Tan. Dec., 152; *U. S. vs. Bassett*, 2 Story, 389; *Dickens vs. U. S.*, Dev. C. C., 42; *U. S. vs. Smith*, 1 Bond, C. C., 68.)

c. The payments to which the claimant refers as having been made to parties whom he names "for services in connection with publishing the Biennial Register" were not authorized by law, and should not have been made. An officer is not entitled to compensation for extra services as on a *quantum meruit*. (*Jay Co. vs. Templer*, 34 Ind., 322.)

II.—Is the claimant entitled to payment for *services* rendered as “returns clerk,” out of the appropriation for the *salary* of such clerk?

Clearly not. The certificate of the Secretary of the Interior shows that the claimant held the office of returns clerk—a *first-class* clerkship—in addition to his *fourth-class* clerkship.

1. *a.* It is sufficient objection to the payment of the claim that *the voucher* presented is *not for* the *salary* of a first-class clerk, or for *salary* of any kind.

It is not for official services, but *for services* not connected with the claimant's office, or any office.

The voucher is in a form in which, if *salary* should be hereafter claimed, it could not be said that the salary or any part of it had been *paid*.

b. The amount of the claim (\$200) shows that in fact it is not for the *salary* of the returns clerk.

2. Can the annual *salary* of the “returns clerk” fixed by law at \$1,200 be paid to Mr. Evans on a proper voucher? Clearly not, in any event.

a. As he presents evidence that he held the office of returns clerk, he is *primâ facie* entitled to payment of the salary.

And according to the opinions above cited, he is *primâ facie* entitled to the *salaries* of both the offices he held.

b. The head of a Department cannot reduce a salary fixed by law. (Rev. Stats., 169.) He cannot say that a *clerk* shall have only \$200 when the law gives him \$1,200. The power to do so would, in effect, be a power to repeal or modify the law. (*Graham vs. U. S.*, 1 Ct. Cls., 380; *Ware's case*, 7 Ct. Cls., 565; *Syphax's case*, 7 Ct. Cls., 529; *Sleigh's case*, 9 Ct. Cls., 369; *Goldsborough vs. U. S.*, Tan. Dec., 80; *U. S. vs. White*, Tan. Dec., 152.) By act of August 5, 1876, (19 Stats., 169, sec. 3,) the head of a Department may “diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade.”

If the duties of a clerk do not require his entire time, he is nevertheless entitled to the salary fixed by law for his office.

Accounting officers will not generally measure the extent or value of the services of an officer having a salary fixed by law, to ascertain how much should be paid. The law settles the amount. (*Ex parte Lawrence*, 1 Ohio St., 431; *Sleigh's case*, 9 Ct. Cls., 369; *Ware's case*, 7 Ct. Cls., 565; *Reinhart's case*, 10 Ct. Cls., 282; 1 Op., 686; 4 Op., 123; 6 Op., 87; 7 Op., 304; 10 Op., 250; *Marbury vs. Madison*, 1 Cranch, 161; *Bowerbank vs. Morris*, Wallace, C. C., 119, 133; *U. S. vs. Williams*, 23 Wall., 411; *U. S. vs. Lippitt*, 10 Otto, 663; *U. S. vs. Jones*, 18 How., 93.)

Congress evidently so understood the law in providing *expressly* that

no salary should be paid in certain cases of *absence*. (Rev. Stats., 40, 41, 1742; Seward's case, *post*, 66.)

If the head of a Department does not intend that a clerk shall receive the full salary for a year for services only requiring a small portion of his time, a proper remedy is to vacate the office for all or a part of the year, or, by virtue of his general authority, assign other duties to the clerk to give full employment.

c. But there are difficulties in the way of paying any salary to Mr. Evans as returns clerk.

The "returns clerk," under section 512 of the Revised Statutes, is a clerk *in the office of the Secretary of the Interior*. He is so regarded by the payment made to him, and by the papers filed in his behalf. But his full salary cannot now be paid, even if an account and voucher were presented for it.

The appropriation for salaries in the office of the Secretary of the Interior for the fiscal year ending June 30, 1880, was \$91,970. (21 Stats., 23.)

The whole appropriation, including the "lapse fund," has been expended, except a balance of \$226.49, after rejecting the voucher for \$200 presented, as already stated.

In any event, no more than this sum of \$226.49 could be paid, because that is all that remains of the appropriation.

The Constitution provides that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law." (Art. I, sec. 9.)

When vacancies occur in any bureau of an Executive Department, by reason of deaths or resignations, and they are not filled immediately, the money which has been appropriated for the payment of salaries in said bureau, and which is not used in the regular course because of vacancies, is termed a "lapse fund," and is often used in the payment of persons temporarily employed. It may be used to pay persons assigned to bureaus other than the one in which the vacancy occurs. (See Rev. Stats., sec. 166.)

The compensation paid from the "lapse fund" corresponds with the salaries prescribed by law. (Rev. Stats., 168, 169, 242; 20 Stats., 184.) Messengers, copyists, and laborers are occasionally employed and paid from the lapse fund appropriated for clerks.

If it were *res integra*, a question might arise as to whether an appropriation for clerks of the first, second, third, and fourth classes could be used for the payment of any other officers or employés. But long usage has determined that it can be so used.

There may be special employ  s, with compensation prescribed either by law, regulation, or agreement. (Rev. Stats., 163, 169, 242; Inspectors' case, 1 Lawrence, Compt. Dec., 201; Converse *vs.* U. S., 21 How., 468; U. S. *vs.* Cadwalader, Gilp., 563; Cox *vs.* U. S., Dev. C. C., 82; Neilson *vs.* Lagou, 12 How., 107; U. S. *vs.* McCall, Gilpin, 571.)

The result is, that if Evans was "returns clerk" for the fiscal year ending June 30, 1880, and is therefore entitled, by virtue of his office, to payment of the salary thereof, the Government is involved in a liability of \$1,200 for his salary, for which there is no appropriation beyond the lapse fund of \$226.49, as stated. (Graham *vs.* U. S., 1 Ct. Cls., 380.) His claim for salary could, in such event, if he has not estopped himself from asserting it, be reported to Congress for an appropriation, under the act of June 14, 1878. (20 Stats., 130.)

d. The claimant is not entitled to any salary as "returns clerk," because he has, by his own acts, *abandoned* all claim thereto and *estopped* himself from claiming it. He has presented a claim not for the salary of the office of "returns clerk," but for the performance of "services" as a clerk of the fourth class, which pertained to the office of returns clerk. His case comes within the first prohibition of section 1764 of the Revised Statutes.

A clerk duly appointed to office is, while holding the office, generally entitled to the salary fixed by law, and certainly he is so entitled if he performs or tenders performance of the duties of such office.

If the law, or regulations prescribed in pursuance of law, require evidence of conditions precedent to the payment of a salary, accounting officers must require such evidence. Beyond this they will not generally inquire.

But when a clerk neither performs the duties of his office, nor tenders performance as such clerk, and, *in addition thereto, repudiates* his office, by performing the duties thereof in another office as *extra-official services*, for which he agrees to ask and accept compensation as for such *extra-official services*, he is estopped from claiming the salary authorized by law. (Jackson's case, 8 Ct. Cls., 354; Martin's case, 10 Ct. Cls., 276; Averill's case, 14 Ct. Cls., 200; Pray's case, 14 Ct. Cls., 256; Hildeburn's case, 13 Ct. Cls., 62; Comstock's case, 9 Ct. Cls., 141; Hancox's case, 9 Ct. Cls., 400; Burrows *vs.* Smith, 10 N. Y., 550; U. S. *vs.* Adams, 7 Wall., 463; Smith *vs.* New York City, 37 N. Y., 518; City of Hoboken *vs.* Gear, 27 N. J. L., 3 Dutch., 265.)

In 9 Opinions, 199, Attorney-General Black says: "An officer forfeits all right to his salary * * * when he does not perform the service assigned him." (See Hunter's case, 1 Lawrence, Compt. Dec., 151.)

The facts stated are equivalent to a renunciation or *resignation* of the office. No law requires the resignation or renunciation of an office to be in *writing*. The voucher in this case is a sufficient writing in connection with the facts. (*People vs. Carrique*, 2 Hill, 93; *Miller vs. Thatcher*, 2 Term R., 87; *Regent, &c., vs. Williams*, 9 Gill & J., 365; *Angell & Ames on Corp.*, 10th ed., 434; 1 Dillon on Corp., sec. 164; *Rex vs. Pateman*, 2 Term R., 777; *U. S. vs. Wright*, 1, McLean, 509; *People vs. Porter*, 6 Cal., 26; *Van Orsdall vs. Hazard*, 3 Hill, N. Y., 243; *State vs. Fitts*, 49 Ala., 402; *Marbury vs. Madison*, 1 Cranch, 137; 3 Nev., 566; *Bouv. Dic.*, tit. "Resignation"—"Abdication.")

Resignation is simply "the act of an officer by which he *declines* his office, and renounces the further right to use it."

This Mr. Evans *did*, notwithstanding the certificate of the Secretary of the Interior. (1 Perry on Trusts, secs. 259, 270; *Doyle vs. Blake*, 2 Sch. & Lef., 239; *Evans vs. John*, 4 Beav., 35; *Smith vs. Knowles*, 2 Grant, Cas., 413; *Crook vs. Ingoldsby*, 2 Ir. Eq., 375; *Doe vs. Harris*, 16 M. & W., 517; *Paddon vs. Richardson*, 7 DeG. M. & G., 563; *James vs. Frearson*, 1 Y. & C., Ch. Ca., 370; *Noble vs. Meymott*, 14 Beav., 471; *Stacy vs. Elph*, 1 M. & K., 199; *Cruger vs. Halliday*, 11 Paige, 314; *Drane vs. Gunter*, 19 Ala., 731; *Shepherd vs. McEvers*, 4 Johns. Ch., 136; *Deefendorf vs. Spraker*, 10 N. Y., 246; *Ex parte Hennen*, 13 Pet., 230.) General Garfield was elected in January, 1880, a Senator of the United States for a term to begin March 4, 1881. In January, 1881, he *declined* the office, and Hon. John Sherman was elected. (See *Miller vs. Supervisors*, 15 Cal., 93.)

No law requires the appointment of a clerk to be in writing. A party appointed to an office may *decline* to accept, and his declination may be evidenced by acts. (*Collins vs. U. S.*, 15 Ct. Cls., 22; *United States vs. Moore*, 95 U. S., 760; *Collins vs. United States*, 14 Ct. Cls., 575; *Marbury vs. Madison*, 1 Cranch, 157.)

On the questions of *resignation* and *estoppel* the accounting officers are required to pass, because these enter into and determine the right to salary. (*Angell & Ames, Corp.*, 10th ed., 434; *Willcock on Mun. Corp.*, 240; *Gabriel vs. Clarke*, Cro. Car., 138; *Verrior vs. Sandwich*, 1 Sid., 305; *Rex vs. Goodwin*, Doug., 383, n. 22; *Milward vs. Thatcher*, 2 Term R., 87; *Rex vs. Pateman*, 2 Term R., 779.)

Executive officers cannot pass on the question whether an officer has *forfeited* his title to office; that is judicial.

The fact that during the fiscal year ending June 30, 1880, no claim was made for *salary* by Mr. Evans as "returns clerk," goes far to show that his services performed were not then deemed as having been rendered by him as such clerk.

It may well be urged, also, that it was well understood that he had no claim for salary as "returns clerk," else the appropriation would not have been otherwise expended.

The Revised Statutes provide:

"SEC. 3679. No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations."

It is clear that the Secretary of the Interior did not regard the services of the claimant "in recording and filing contracts in the Returns Office, per act of June 2, 1862," as having been rendered for the *salary* of returns clerk. This conclusion results not from the certificate of the Secretary, which, taken by itself, would show the contrary, but from the facts. It is corroborated by the distinguished ability and great fidelity which have characterized the successful administration of the Interior Department under the guidance of its learned and able Secretary.

In the confusion which has existed as to the law, in cases in many respects similar to that now presented, it is by no means strange that the excellent and efficient clerk who makes the claim should have believed it to be fully sanctioned by law.

But the law, properly administered, gives it no sanction.

The action of the Auditor in declining to allow credit for the payment to Mr. Evans is hereby affirmed. The charge of the disbursing clerk is disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, January 4, 1881.

**IN THE MATTER OF THE RIGHT OF THE ASSISTANT CLERK
OF THE COURT OF CLAIMS TO FEES FOR SERVICES AS
REFEREE IN CASES OF OUTSTANDING CLAIMS AGAINST
THE DISTRICT OF COLUMBIA.—RANDOLPH'S CASE.**

1. The act of June 4, 1880, (21 Stats., 162,) makes an appropriation to pay the fees of referees in cases in the Court of Claims under the act of June 16, 1880, (21 Stats., 284.)
2. The fees of referees in cases under the latter act are to be paid by the Commissioners of the District of Columbia.
3. Where the referee appointed by the Court of Claims under this act is assistant clerk of the Court of Claims, he is not entitled to fees as referee, even though his annual salary is less than \$2,500.
4. The referee is not an *officer*.

5. An appropriation in general terms is applicable as well to cases authorized by subsequent as by prior laws.
6. An apparent conflict in the mere words of different statutes relating to the same subject, should be reconciled so as to give effect to the general policy and system they establish, rather than be held to create anomalies inconvenient in practice.
7. Construction given to the Revised Statutes, sections 1763, 1764, and 1765, as also to the act of June 20, 1874, (18 Stats., 101, 109.)

The act of June 16, 1880, (21 Stats., 284,) "to provide for the settlement of all outstanding claims against the District of Columbia," &c., enacts that—

"When the trial of any claim against the District of Columbia, prosecuted under the provisions of this act, involves the taking and stating of a long account, * * * said court [of Claims] shall have power to award a reference to a competent referee to take and state such account * * *, and any such referee shall be allowed such compensation for his services as the court may determine, not exceeding ten dollars per day for time actually employed, to be paid on the order of the court by the Secretary of the Treasury, and charged to the account of the District of Columbia."

At December term, 1880, on January 4, 1881, the Court of Claims ordered that "there be allowed to John Randolph the sum of thirty-five dollars as compensation for three and one-half days' services [rendered after June 30, 1880] as referee appointed by the court in the case of Samuel Cook *vs.* The District of Columbia, and that the Secretary of the Treasury pay the said amount to said Randolph and charge the same to the account of the District of Columbia."

The order having been sent by Mr. Randolph to the Secretary of the Treasury for payment, he, on January 11, 1881, referred it to the First Comptroller.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

Mr. Randolph is, and was when he acted as referee, assistant clerk of the Court of Claims, with an annual salary of \$2,000. (Rev. Stats., 1053, 1054, 1765; act June 20, 1874, 18 Stats., 101, 109; Bowen *vs.* U. S., 100 U. S., 508.)

The questions which arise in this matter are these:

1. Is there an appropriation?
2. If the payment is authorized, shall an account be stated in the Treasury Department, or shall the claim be referred to the Commissioners of the District of Columbia, to be paid by them, and to render an account therefor?

3. Is the claimant, being an officer, entitled to payment?

I.—The act of June 4, 1880, (21 Stats., 155, 162,) "making appropri-

tions to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, eighteen hundred and eighty-one, and for other purposes," appropriates—

"For general contingent expenses of the District of Columbia, not otherwise sufficiently provided for, * * * twenty thousand dollars."

It then provides:

"SEC. 2. That all moneys appropriated by this act, together with all revenues of the District of Columbia from taxes or otherwise, shall be deposited in the Treasury of the United States as required by the provisions of section four of an act approved June eleventh, eighteen hundred and seventy-eight, and shall be drawn therefrom only on requisition of the Commissioners of the District of Columbia (except that the moneys appropriated for interest and the sinking fund shall be drawn therefrom only on the requisition of the Treasurer of the United States), such requisition specifying the appropriation upon which the same is drawn; and in no case shall such appropriation be exceeded either in requisition or expenditure, and the accounts for all disbursements of the Commissioners of said District shall be made monthly to the accounting officers of the Treasury by the auditor of the District of Columbia on vouchers certified by the Commissioners as now required by law: *Provided*, That said Commissioners shall not make requisitions upon the appropriations from the Treasury of the United States for a larger amount during said fiscal year than they make on the appropriations arising from the revenues of said District: *And provided further*, That they shall submit their annual estimates to the Secretary of the Treasury by the first day of October of each year."

The act of June 11, 1878, "providing a permanent form of government for the District of Columbia," (20 Stats., 102,) declares:

"SEC. 3. That * * * the Commissioners * * * shall have power * * * to apply the * * * revenues of said District to the payment of the current expenses thereof * * *."

"SEC. 4. That the said Commissioners may, by general regulations consistent with the act of Congress of March third, eighteen hundred and seventy-seven, entitled 'An act for the support of the government of the District of Columbia for the fiscal year ending June thirtieth, eighteen hundred and seventy-eight, and for other purposes,' or with other existing laws, prescribe the time or times for the payment of all taxes and the duties of assessors and collectors in relation thereto. *All taxes collected shall be paid into the Treasury of the United States, and the same, as well as the appropriations to be made by Congress as aforesaid, shall be disbursed for the expenses of said District, on itemized vouchers, which shall have been audited and approved by the auditor of the District of Columbia, certified by said Commissioners, or a majority of them; and the accounts of said Commissioners, and the tax-collectors, and all other officers required to account, shall be settled and adjusted by the accounting-officers of the Treasury Department of the United States.* Hereafter the Secretary of the Treasury shall pay the interest on the three-sixty-five bonds of the District of Columbia issued in pursuance of the act of Congress approved June twentieth, eighteen hundred and seventy-four, when the same shall become due and payable; and all amounts so paid

shall be credited as a part of the appropriation for the year by the United States toward the expenses of the District of Columbia, as hereinbefore provided."

The service rendered by the claimant was for the District of Columbia, in a case in the Court of Claims.

The appropriation act of June 4, 1880, (21 Stats., 162,) in the item for contingent expenses not otherwise sufficiently provided for, is sufficiently comprehensive to cover this claim. There is no other appropriation applicable, and it is not to be presumed that there is no appropriation, if the act of June 4, 1880, is sufficiently clear and comprehensive to include it.

An act making an appropriation in *general terms* applies as well to cases arising under subsequent as under prior laws. (Audit case, 1 Lawrence, Compt. Dec., 37.) This results from the rule of construction: *Generalia verba sunt generaliter intelligenda*.

There is, then, an appropriation applicable to this claim.

II.—Both the act of June 11, 1878, (20 Stats., 102,) and the act of June 4, 1880, (21 Stats., 162,) require this claim to be paid by the Commissioners of the District on a voucher "audited and approved by the auditor of the District," and with money in the Treasury placed to their credit, "only on requisition of the Commissioners." When paid, the voucher is to be carried into the "accounts of said Commissioners," to be "settled and adjusted by the accounting-officers of the Treasury Department."

There could be no doubt of this if the act of June 16, 1880, (21 Stats., 284,) had not declared that the claim should "be paid on the order of the court *by the Secretary of the Treasury*, and charged to the account of the District of Columbia."

Assuming that there is an appropriation for the payment of this claim, and then comparing the acts of June 16, 1880, June 11, 1878, and June 4, 1880, there is an evident conflict in the *mere words* they employ. One declares that the claim *shall be paid* by the Secretary of the Treasury.

The act of 1878 says that *all* the money applicable to expenses of the District shall be paid by the Commissioners on vouchers "approved by the auditor of the District," and "the accounts of said Commissioners [including such payments] shall be settled and adjusted by the accounting-officers of the Treasury Department."

It may be urged that, as to this claim, the act of June 16, 1880, *creates an exception*, and to that extent works a repeal of the mode of payment.

No repeal is, in *terms*, declared by the act of June 16, 1880, and a repeal by implication should not be inferred, especially for an isolated claim.

This leaves the conflict in the words of the statutes to be disposed of. They must be reconciled in some form. The purpose and policy of the laws are to govern when apparently conflicting words cannot: *qui haeret in literâ haeret in cortice*. Each statute must be construed by the aid of the maxim *Ut res magis valeat quam pereat*. And, again, *quando res non valet ut ago, valeat quantum valere potest*.

If the act of June 16, 1880, be held to provide an exceptional mode of paying a single claim or class of claims, the anomaly thus produced complicates the system of payment and of accounts. It would be an invasion of general methods. In such case there is a principle of law which may well be applied: "Where the law is doubtful, and not clear, the judges ought to interpret the law to be as is most consonant to equity and least inconvenient." (Broom, Leg. Max., 186.) This is founded on the maxim, *Nihil quod est inconveniens est licitum*. And, again, *argumentum ab inconvenienti plurimum valet in lege*.

In the light of these principles the statutes must be construed to mean that claims of this class must be audited and paid as claims generally against the District. This does not defeat the general meaning of the act of June 16, 1880. Inasmuch as all the revenues of the District are to be "deposited in the Treasury * * * to be drawn therefrom only on requisition of the Commissioners," and as money can only be so drawn on warrants issued by the Secretary of the Treasury, (Rev. Stats., 248,) the payment is made by the Secretary sufficiently to meet the words of the law.

Claims of this class, then, must be presented to the Commissioners of the District for payment, as other claims generally are.

III.—The claimant, being, as assistant clerk, an officer of the United States, is not entitled to payment.

1. If the position of *referee* were an *office*, then the claimant could take his salary as clerk and the fees as referee. (Wade's case, 1 Lawrence, Compt. Dec., 302; Herndon's case, *Id.*, 49; Collins's case, 15 Ct. Cls., 22.) But as referee he is not an *officer*. (Wood's case, 1 Lawrence, Compt. Dec., 8; Bender's case, *Id.*, 317; U. S. vs. Germaine, 99 U. S. 511.)

2. The naked question is presented, therefore, whether the claimant, as assistant clerk, with an annual salary *less than* \$2,500, is authorized to receive fees as referee.

This question arises upon the following provisions of law:

"SEC. 1763. No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

"SEC. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

"SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

The act of June 20, 1874, (18 Stats., 101, 109,) provides:

"That * * * hereafter it shall be unlawful to allow or pay to any of the persons designated in this act any additional compensation from any source whatever * * *."

The assistant clerk of the Court of Claims is one of the persons designated in this act. (18 Stats., 108.) It is further provided in the same act:

"SEC. 3. That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the treasury or property of the United States beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees." (See Rev. Stats., 1835.)

a. There has been some contrariety of opinion as to the proper rule of construction applicable to these statutes. (Audit case, 1 Lawrence, Compt. Dec., 44; Herndon's case, *Id.*, 51; Bender's case, *Id.*, 325.)

b. The Attorney-General, in an opinion, June 11, 1877, (15 Op., 307,) said of sections 1763, 1764, and 1765 of the Revised Statutes:

"The construction which has been given to these statutes (especially in the case of *Converse vs. The United States*, 21 How., 463) is that the intent and effect of them is to forbid officers holding one office to receive compensation for the discharge of duties belonging to another, or additional pay, extra allowance, or compensation for such other services or duties where they hold the commission of but a single office, and, by virtue of that office, or in addition to the duties of that office, have assigned to them the duties of another office. * * *"

"The evil intended to be guarded against by these statutes was not so much plurality of offices as it was additional pay or compensation

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to an officer holding but one office for performing additional duties, or the duties properly belonging to another."

In the annual report of the First Comptroller for the fiscal year ending June 30, 1879, he says:

"It has been steadily held under these several provisions that to no officer or clerk performing additional services in the same line of duty or performing duties which belong to another officer or clerk, can an extra allowance or compensation be made for such additional service."

c. Section 1763 of the Revised Statutes does not touch the question in this case. It relates only to an officer who discharges "the duties of any *other* office" than the one he holds. The officer who is claimant now is not asking pay for discharging the duties of any other office. (Herndon's case, 1 Lawrence, Compt. Dec., 48.)

Section 1764 does not touch the question in this case, because the services performed as referee were not, within the words of the section, "extra services * * * which any officer or clerk may be required to perform."

The services as referee were in no sense attached to the office of assistant clerk, or required of the claimant because he was such. (Herndon's case, 1 Lawrence, Compt. Dec., 48.)

The claimant is clearly prohibited from receiving payment for services as referee by section 1765 of the Revised Statutes, and by the act of June 20, 1874. (18 Stats., 101, 109.)

These provisions have been construed in cases which in principle determine the question now presented. (Reporter's case, 1 Lawrence, Compt. Dec., 307; Wade's case, *Id.*, 302; Bender's case, *Id.*, 317; Herndon's case, *Id.*, 45; 10 Op. Att.-Gen., 439, 446.)

There is an appropriation to pay for services of referees, and to that extent the requirements of the last clause of section 1765 are met, but the other condition of said clause does not exist; that is, "the appropriation therefor" *does not* "explicitly state that it is for such * * * compensation" of an officer. The cases cited sustain this view.

The opinion of the Attorney-General of February 7, 1877, (15 Op., 608,) has not been overlooked. It holds that where a given service is "required by law, but not of any particular official, and compensation therefor is *fixed by competent authority*, and is appropriated," payment may be made to an officer.

In *Converse vs. U. S.*, 21 How., 473, the court say, in effect, that, in the case of such services, an officer cannot be paid unless the remuneration for them is "*fixed by law.*"

Not only the right of officers to expend contingent funds, but also the authority given by many general appropriations, enable them, in

their *discretion*, to select agents and fix *compensation*. That is "*competent authority*." To hold that extra compensation may be fixed in amount by such "*competent authority*" of a court would seem to defeat the whole purpose of the statute. No payment can be made in any case unless the amount is fixed by "*competent authority*."

If, in *every case* where services are (1) *authorized*, (2) *appropriated for*, and (3) *fixed* in amount by such "*competent authority*," payment can be made, what class of cases can arise in which officers cannot obtain extra or additional compensation? None will be excepted; the whole purpose of the law would be defeated.

And the act of June 20, 1874, (18 Stats., 101, 109,) is entitled to consideration in this matter, which did not affect the question decided in 15 Op., 608.

There has been a legislative construction of section 1765 of the Revised Statutes, in accordance with principles herein stated. (Reporter's case, 1 Lawrence, Compt. Dec., 312; see Rev. Stats., 215, 235, 393, 416, 440; 18 Stats., 101; 20 Stats., 198.)

It may be suggested that the fees of referees are not paid from the Treasury of the United States.

If they were paid from taxes collected from the people of the District of Columbia, these are levied and collected under the authority of the United States, and by force of laws enacted by Congress. The prohibitions against extra compensation, by their terms, object, spirit, and policy, are all aimed against the right to extra allowances paid from any source under the authority of the National Government.

As a matter of law and fact, the fees of the referee are to *come from the Treasury of the United States*. The act which makes the appropriation to pay them has been cited above, and shows that this is the fact. (Act June 4, 1880, 21 Stats., 162, sec. 2.)*

And by the act of June 11, 1878, (20 Stats., 104,) one-half of the fees of referees is paid from revenues of the United States. (Richey's case, 1 Lawrence, Compt. Dec., 90.)

• The claim made by Mr. Randolph cannot be paid.

TREASURY DEPARTMENT,

First Comptroller's Office, January 5, 1881.

* NOTE.—By the act of March 3, 1881, "to provide for the expenses of the government of the District of Columbia for the year ending June thirtieth, eighteen hundred and eighty-two, and for other purposes," (21 Stats., 458, 464,) Congress appropriated—

"For payment, upon order of the Court of Claims, of referees appointed by said court, under the act approved June sixteenth, eighteen hundred and eighty, two thousand dollars."

IN THE MATTER OF THE RIGHT OF THE SECRETARY OF WAR TO IMPOSE UPON A CLERK THE DUTIES OF A SUPERINTENDENT OF CONSTRUCTION, SUSPEND HIS REGULAR SALARY, AND FIX HIS COMPENSATION AS SUCH SUPERINTENDENT AT A HIGHER RATE THAN THAT OF HIS CLERKSHIP.—EVELETH'S CASE.

1. Where an appropriation act charges the head of a Department with the duty of repairing a building, but does not specifically provide for agents to superintend the work, or disburse the appropriation, such head of a Department has implied authority to appoint the necessary agents to perform these duties.
2. Such head of a Department may appoint as such special agent a clerk in his Department, who, during the time he is employed as such, may receive his salary as clerk, but cannot lawfully be paid compensation for services as agent.
3. A special agent, appointed for either of the purposes named, is not by virtue of such appointment an officer.
4. The office of "disbursing clerk" is created, and the salary thereof fixed, by law. But the position of *special agent*, "charged with the duty of disbursing public moneys," is not created, nor is any salary prescribed, by law, and hence it is not an office.
5. The head of a Department can, by virtue of section 161 of the Revised Statutes, give a clerk leave of absence without pay, but cannot, without the assent of a clerk, deprive him of *his right to salary*.
6. While a person continues to hold the office of clerk, and consents that his salary be suspended for a time by the head of a Department, he does not thereby become entitled to extra compensation for services the payment of which is prohibited by section 1765 of the Revised Statutes.
7. The case of *The United States vs. Jones*, 18 How., 93, considered.
8. When the law vests an officer with a particular power, to be exercised or not, in his discretion, and authorizes him to examine and decide on facts essential to the exercise of this discretion, his decision is generally conclusive, *unless there be some other law giving other officers a right to revise his decision*. But this principle has no application to the accounting officers who are charged with a duty to examine and pass upon claims against the United States. Such duty is not *discretionary*, but *imperative*. Hence, when officers other than the *accounting officers* of the Treasury Department are intrusted with the decision of questions affecting the payment of claims, their decision is subject to review and control by the proper accounting officers, by express provision of law. (Rev. Stats., 191, 269, 277.)
9. These classes of cases illustrate the rule of construction, *verba generalia restringuntur ad habilitatem rei vel personam*.
10. The cases of *Martin vs. Mott*, 12 Wheat., 19, and *Allen vs. Blunt*, 3 Story, C. C., 742, distinguished in principle from those cases in which the allowance of claims by certain officers is by law subject to revision by the accounting officers of the Treasury Department. *Kaufman vs. United States*, 96 U. S., 567, considered.

11. When executive officers who are not accounting officers *allow* an account in favor of a claimant, the accounting officers are authorized to determine whether the officer so making an allowance had jurisdiction, and to reject or modify it unless their allowance is made conclusive by express provision of law.

On the 1st of July, 1880, the Secretary of War addressed a letter to James Eveleth, as follows:

"In the appropriation for sundry civil expenses of the Government for the fiscal year ending June 30, 1881, is the following provision:

"To enable the Secretary of War to cause to be constructed a fire-proof roof for the building on the corner of Seventeenth and F streets—twenty-five thousand one hundred and seventy-eight dollars and fourteen cents, or so much thereof as may be necessary.' (Act of June 16, 1880, 21 Stats., 260.)

"In order to carry out the design of this section, the sum therein appropriated will be placed in your hands for the construction of the fire-proof roof for Winder's Building, as provided for in the above-named section; and you will take such steps as may be necessary, with the approval of the Secretary of War, to advertise and make contracts with the lowest bidder for the work."

On the 21st of July, 1880, the Secretary of War addressed another letter to Mr. Eveleth, as follows:

"As the assignment to you of direction and superintendence of the work of putting the fire-proof roof on the Government building at the corner of Seventeenth and F streets, and of disbursing the appropriation of \$25,178 $\frac{1}{10}$ made by act of June 16, 1880, for that purpose, will probably leave you but little time, during the progress of that work, for attention to *your duties as clerk in the office of the Chief of Engineers*; and, in consideration of the requirements of law that you enter into bond for faithful accountability for the public money to be from time to time advanced you from the Treasury, *your salary as clerk*, as well as *your salary as superintendent of Winder's Building*, will, for such time, be suspended, and you will be allowed, instead thereof, *three hundred dollars per month*, for the service above referred to, from the date of your assignment to it to the time of its conclusion, to be paid out of the appropriation for the construction of the roof.

"You will please file the requisite bond, in the sum of \$10,000, without delay."

On the 20th of November, 1880, "James Eveleth, superintendent of the building on the corner of Seventeenth and F streets," (Winder's Building,) filed his account of receipts and disbursements, in which he credits himself with three hundred dollars compensation for each of the months of July, August, and September, 1880.

The papers are submitted informally by the First Auditor to the First Comptroller, to decide whether the three credits of three hundred dollars each can be allowed.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

On behalf of the disbursing agent it has been suggested, that it would have been competent for the Secretary of War to entitle Mr. Eveleth to the compensation fixed for his services as superintendent of construction by removing him for the time being from his clerkship, and then appointing him special disbursing agent and superintendent of construction; and that the credit should be allowed upon the principles laid down by the Supreme Court in the case of *The United States vs. Jones*, 18 Howard, 92.

The Secretary of War was, by the act of June 16, 1880, charged with the duty of constructing a fire-proof roof on "Winder's Building," in Washington. As the act did not give specific directions as to the mode of executing it, or provide for the appointment of subordinate officers or agents for the purpose of the appropriation, the whole matter was left to the discretion of the Secretary of War, subject, however, to the restrictions and limitations of other laws.

He could, by virtue of that act, as he properly did, appoint a special agent, to be "charged with the disbursement of public moneys," *subject to the law* which required such agent to give bond. (Rev. Stats., 161, 183, 3614; Birch's case, 1 Lawrence, Compt. Dec., 154; Inspectors' case, *Id.*, 201; Bender's case, *Id.*, 317.)

He might properly appoint a *clerk* in his office as such special agent, and permit him to continue to receive the salary of his office as such, but the *clerk*—the man so appointed agent—while he continued to be clerk, would be subject to the prohibition of section 1765 of the Revised Statutes, and of other laws, against receiving any pay for such services as such special agent other than his salary as clerk.

This prohibition has already been so fully discussed that it is only necessary to refer to decided cases. (Reporter's case, 1 Lawrence, Compt. Dec., 307; Wade's case, *Id.*, 302; Bender's case, *Id.*, 317; Herndon's case, *Id.*, 45; Randolph's case, *ante*, 12.)

Under the act of June 16, 1880, the Secretary of War very properly devolved upon Mr. Eveleth two classes of duties—those of a special agent "charged with the disbursement of public moneys," and those of *superintendent of construction*.

In neither one of *these* positions was he an *officer*.

The statute distinguishes between "*disbursing clerks*" and "*special agents*" who are "charged with the disbursement of public moneys." A disbursing *clerk* is an *officer*. His *office* is created and salary fixed by law. (Rev. Stats., 176, 201, 215, 235, 351, 393, 416, 440.)

A special agent is equally authorized by law—"charged with the

disbursement of public moneys." Thus, section 3614 of the Revised Statutes (the provision of which is taken from section 14 of the act of August 4, 1854, 10 Stats., 573) provides that—

"Whenever it becomes necessary for the head of any Department or office to employ special agents, other than officers of the Army or Navy, who may be charged with the disbursement of public moneys, such agents shall, before entering upon duty, give bond in such form and with such security as the head of the Department or office employing them may approve."

This provision does not *give authority* to appoint a special agent—it only declares what shall be done when under an appropriation act, or by virtue of express or implied power, the head of a Department may find it necessary to appoint such agent. (Birch's case, 1 Lawrence, Compt. Dec. 156.)

The special agent charged with this duty is not an officer. (Bender's case, 1 Lawrence, Compt. Dec., 317, 391.)

While Mr. Eveleth acted as special agent, and as superintendent of construction, he held also, as he had a right to hold, two offices—he was *clerk* in the office of the Chief of Engineers and superintendent of Winder's Building.

Both these offices were created by law. (Rev. Stats., 215.)

He did not resign either of these offices; he was not removed; his ability and experience were such that the War Department could not properly dispense with his services.

The instructions of the Secretary of War to him recognize him as occupying both offices. They show that it was expected that he would devote to them "but little time during the progress of" the work to which he was assigned.

It may possibly be immaterial whether he devoted any time to either of the offices. He held the offices, and was entitled to the salary of each.

His instructions informed him that his salary as clerk and as superintendent of Winder's Building would "be suspended" while engaged in superintending the construction of the roof and in disbursing the appropriation therefor.

The Secretary of War could give Mr. Eveleth, as clerk, leave of absence without pay. (Bender's case, 1 Lawrence, Compt. Dec., 317.)

Whether he could *suspend the salary* of a clerk, with the consent of the latter, it is not necessary to decide; or whether a suspension, assented to under a mistake of law, would defeat the right to salary, is not now material.

The Secretary of War certainly could not, without the consent of a

clerk, suspend his right to a salary. He cannot suspend a law or deny a right given by law.

Section 1765 of the Revised Statutes imposes its prohibition against extra pay to officers, without regard to the amount or suspension of the salary, or to the question whether or not they have a leave of absence without pay, as they may have by virtue of section 161 of the Revised Statutes. (See Rev. Stats., 40, 41, 1742.)

To permit exceptions for such cases would defeat the whole policy of section 1765. (Bender's case, 1 Lawrence, Compt. Dec., 317.)

The sole question to be determined, in view of what has been stated, is this: Can an officer, for services not connected with his office, be lawfully paid compensation fixed in amount at the discretion of the head of a Department, when such services are lawfully rendered by direction of such head of a Department?

The prohibition contained in section 1765 of the Revised Statutes is as follows:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

If even the position of special agent for disbursing money were an office, which it is not, the compensation now claimed could not be allowed. It does not appear what part of it is for *disbursing money*, or what part for superintending the construction of a roof, &c. The larger part would necessarily be for the latter service, and the compensation for this would be excluded because of the incumbency of any one of the three offices mentioned, including the special agency as an office.

It is suggested that the decision of the Secretary of War on the question of the right to the compensation is final.

This is a mistake. No officer can make a payment legal which is expressly prohibited by law, as this is.

An order of the Secretary of War, in form giving a right to such extra, but prohibited, compensation, would be *ultra vires*, and void.

The case of *The United States vs. Jones*, (18 How., 93,) in no way conflicts with the views above presented.

That case may possibly be supposed to assert the principle that the action of the head of a Department in the allowance of a claim is generally conclusive on accounting officers, and to recognize the right of the head of a Department to modify balances certified by a Comptroller.

This latter right was at one time asserted. (Bender's case, 1 Lawrence, Compt. Dec., 331; 10 Op. Att.-Gen., 237.)

But the act of March 30, 1868, now section 191 of the Revised Statutes, which is simply declaratory of the law as it always was, removes all doubt upon this latter question, and maintains the authority of accounting officers. The Jones case is one in which the court were divided in opinion, and the reasoning of the two dissenting justices has great force. But the case itself, when properly considered, gives no color to the claim that the action of the head of a Department is, on such questions as that now presented, conclusive on accounting officers. This has been elsewhere fully shown. (1 Lawrence, Compt. Dec., Appendix, ch. XII, p. 531.)

There is a class of cases which, in this connection, it may be proper to notice.

Thus, in *Allen vs. Blunt*, 3 Story's Circuit Court Reports, 742, it is laid down, as a general rule, that—

“Where a particular authority is confided in a public officer, to be exercised in his discretion upon an examination of facts, of which he is made the appropriate judge, his decision upon these facts is, **IN THE ABSENCE OF ANY CONTROLLING PROVISIONS**, absolutely conclusive as to the existence of those facts.”

The case of *The United States vs. Jones*, 18 How., 93, may, in some of its aspects, perhaps, be classed with these. (*Martin vs. Mott*, 12 Wheat., 19, and sundry cases cited in Bender's case, 1 Lawrence, Compt. Dec., 339.) But the *principle* stated in those cases has no application to an officer charged with a duty to examine and allow or disallow claims. Such duty is not *discretionary*; it is *imperative*.

But it is to be observed that the principle above stated is, that the decision of an officer is only conclusive “*in the absence of any controlling provisions.*”

Here there are two controlling provisions—section 1765 of the Revised Statutes, which controls the Secretary of War; and the provisions of law which give the accounting officers of the Treasury a right to revise the allowances and decisions of the Secretary of War. (Rev. Stats., 191, 269, 277.)

In the case of *Kaufman vs. U. S.*, (96 U. S., 567,) and in the *Green-castle Bank case*, (15 Ct. Cls., 229,) no allusion is made to these sections; nor does either of them discuss all the points presented in House Ex. Doc. No. 27, 2d Sess. 45th Cong., 43. (See Wells's *Res Adjudicata* and *Stare Decisis*, sec. 485; *Kilbourn vs. Thompson*, Sup. Ct. U. S., Oct. term, 1880.) Those cases rest on sections 3220 of the Revised Statutes, taken originally from the act of June 30, 1864, section 44, which pro-

vided a mode of making the decision of an officer *final*. (13 Stats., 240.) In those cases no allusion is made to the repeal of that provision. (Act March 3, 1865, 13 Stats., 483.) But those cases do not conflict with the principles now decided.

Notwithstanding the law, in many cases, gives officers a right to judge of facts, their judgment may be made subject to revision.

If a patent for land be issued without jurisdiction, or if letters-patent for a patent-right be granted, the courts have authority to set all these aside for want of jurisdiction, or for illegality in the acts of the officers issuing them.

If the officers who issue land patents for land not by law subject to such grant decide that the lands are subject to grant, and that they have jurisdiction to issue patents, their decision on their right to issue patents is not conclusive. This has always been so held in every court. (*Minter vs. Crommelin*, 18 How., 87; *U. S. vs. Schurz*, Sup. Ct. U. S., Oct. term, 1880.)

Hence, when an officer who is not an accounting officer is authorized to allow an account, the accounting officers of the Treasury Department can revise his decision and decide whether he had jurisdiction, and reject or modify his allowance. (*Flack's case*, 1 Lawrence, Compt. Dec., 187; *Savings-Bank case*, *Id.*, 194; see *Bank of Greencastle case*, 15 Ct. Cls., 229.)

A statute could, of course, be so drawn as to take from the usual accounting officers the duty to audit and *finally* certify balances due a class of claimants and transfer this duty to other officers, or, as to balances certified by such other officers, devolve on the proper accounting officers mere *ministerial* duties; but no statute so hostile to the general policy of legislation, so variant from usage, and carrying a repeal by implication, could be construed as giving such power, except by words which would render such purpose clear beyond reasonable doubt. (*Rev. Stats.*, 47, 48, 4646; *Seward's case*, *post*, 59; *Special-Session case*, *post*, 89; *Langford's case*, *post*, 269.)

The First Auditor is advised that the three items of \$300 each, for which credit is claimed, should be disallowed.*

TREASURY DEPARTMENT,

First Comptroller's Office, January 8, 1881.

* This claim, having been rejected, was reconsidered by the First Comptroller, and the above opinion reaffirmed in a decision, which see in 3 Lawrence, Comptroller's Decisions.

IN THE MATTER OF THE PARTY TO WHOM CHECKS FOR INTEREST DUE TO INFANTS MAY PROPERLY BE DELIVERED AND PAID.—INFANT'S CASE.

1. When Government bonds are registered in the name of infants, checks issued in payment of interest thereon should be delivered and paid only to the proper guardian of such infant, when the Secretary of the Treasury has been notified of the fact of infancy.
2. Neither the father nor mother of an infant has the right, as a general rule, to indorse or collect such interest-checks.
3. The guardian of an infant, in order to indorse and collect interest-checks, is required to file with the First Auditor evidence (1) of guardianship, (2) that his authority as such is in force, and (3) of the identity of his ward as the payee in the bonds.
4. The Government is not liable to refund to an infant, on his arriving at the age of majority, money paid to him on his indorsement of interest-checks during his minority, when the Secretary of the Treasury has not been notified of the fact of infancy.
5. Whether the Government is liable after notice of the fact of infancy—*quare?*
6. When minors are lawfully in the public service, payment of compensation to them for such service is valid.

On the 26th January, 1881, the Assistant Treasurer of the United States at Philadelphia addressed a letter to the First Auditor of the Treasury Department, saying that in a letter from the Secretary of the Treasury, dated July 5, 1871,* instructions were given that "a minor may not receipt for interest on registered bonds standing in his own name."

He adds:

"Some interest-checks in favor of children, indorsed with their individual names by a parent, having lately been presented at this office for payment, I will thank you to inform me if the ruling above mentioned is still in force, and, if so, what method may be employed to obviate the difficulty in which the holders of these bonds are placed."

This letter was referred, January 28, 1881, by the First Auditor, to the First Comptroller for his decision.

* The letter was as follows :

TREASURY DEPARTMENT, July 5, 1871.

SIR: Your letter of the 3d instant is received.

A minor has not the right to receipt for interest on registered stock standing on schedule in his own name; but where the stock stands in name of an adult, a minor may receipt for the interest, provided he be constituted an attorney for such purpose by the adult.

Very respectfully,

J. F. HARTLEY,
Acting Secretary.

ASSISTANT TREASURER U. S., Phila., Pa.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The interest on registered bonds is paid by *checks*, (Rev. Stats., 3593, 3644,) in the form following:

WASHINGTON.

FEBRUARY 1, 1881.

[Vignette.]

FUNDED LOAN OF 1881.

INTEREST AT 5 PER CENT.

Treasurer of the United States, Assistant Treasurer, or Designated Depository :

Pay to John Smith, or order, ————¹⁰⁰ dollars, for three months' interest due ————, ————, on \$——— registered stock, and charge amount in general account with the Treasurer, U. S.

[Number.]

A. U. WYMAN,

\$———

Assistant Treas'r, U. S.

(See Rev. Stats., 300, 306, 307, 308, 3418, 3593, 3644, 3645, 3646, 3647, 4046, 4765, 4770, 5208, 5413, 5414; Rhawn's case, 1 Lawrence, Compt. Dec., 109; Moyer's case, *Id.*, 116.)

Apparently, the title of an interest-check drawn payable to the order of an infant is in him, and technically he is invested with the naked legal title. There are cases which hold that "an infant may indorse a bill or note made payable to him or order, so far, at least, as to enable the indorsee to recover against the drawer, acceptor, or maker, who, by undertaking to pay to him, or to his order, are estopped to deny his capacity to order payment to be made to the indorsee." (1 Daniel, Neg. Inst., 181, sec. 227; *Nightingale vs. Withington*, 15 Mass., 272; *Frasier vs. Massey*, 14 Ind., 352; *Hardy vs. Waters*, 38 Maine, 450; *Grey vs. Cooper*, 3 Doug., 65, [1782;] *Taylor vs. Croker*, 4 Esp., 187, [1803;] *Jones vs. Darch*, 4 Price, 300, [1817;] *Drayton vs. Dale*, 2 B. & C., 293; 2 Dow. & Ry., 534, [1823;] *Chitty on Bills*, [*20,] 26-29; *Story on Notes*, sec. 80; *Story on Bills*, sec. 85; *Thomson on Bills*, 134, 135; *Byles on Bills*, Sharswood's ed., [*60,] 149; *Edwards on Bills*, 246; 1 Pars. Cont., 6th ed., 330; *Dulty vs. Brownfield*, 1 Barr, 497.)

But if this be so as between natural persons, it does not follow that the same rule must apply to the Government, since the principle of *estoppel* does not generally apply to it. (*Herman on Estoppel*, secs. 130, 219; *Johnson vs. U. S.*, 5 Mason, 425; *U. S. vs. Primrose*, Gilp., 58; *Vt. vs. Society, &c.*, 2 Paine, 545.)

It is not necessary now to decide on the rights of the indorsee of an infant, or to determine the duty of the Government arising thereon.

It has been said that, "if the indorsee of an infant payee is paid, the infant cannot avoid his indorsement, because he cannot restore the maker of the bill or note to the same condition as before." (1 Pars. Cont., 6th ed., 321, note (e); *Dulty vs. Brownfield*, 1 Barr, 497; *Willis vs. Twambly*, 13 Mass., 204; *Nightingale vs. Withington*, 15 Mass., 272.)

Whatever may be the result as to the question of the liability of the Government on an interest-check indorsed by an infant to a *boná fide* holder, it is better to avoid any complication, by sending such check only to the proper guardian, to whom payment should be made.

It is said by Daniel that, "as a general rule, payment [of notes and bills] should be made to his [an infant's] guardian, and, if it be made to the infant *personally*, and be thereby dissipated and lost, the payer would not be discharged." (1 Neg. Inst., 181, sec. 227; Phillips *vs.* Paget, 2 Atk., 80; 2 Kent, Com., 230; Schouler's Domestic Relations, 435, 462; Genet *vs.* Tallmadge, 1 Johns. Ch., 3; Jackson *vs.* Sears, 10 Johns., 435; Eichelberger's appeal, 4 Watts, 84; Swan *vs.* Dent, 2 Md. Ch., 111; Crenshaw *vs.* Crenshaw, 4 Rich. Eq., 14; Chapman *vs.* Tibbits, 33 N. Y., 289; Smith *vs.* Bean, 8 N. H., 15; Shepherd *vs.* Evans, 9 Ind., 260; Somes *vs.* Skinner, 16 Mass., 348; Longstreet *vs.* Tilton, Coxe, 38; Sillings *vs.* Bumgardner, 9 Gratt., 273; Brown *vs.* Brown, 5 E. L. & Eq., 567; Savage *vs.* Dickson, 16 Ala., 257; Hill, Trustees, 447, and cases; Caffrey *vs.* Darby, 6 Ves., 488; Powell *vs.* Evans, 5 Ves., 839; Leusen *vs.* Copeland, 2 Bro. C. C., 156; Tibbs *vs.* Carpenter, 1 Madd., 298; Caney *vs.* Bond, 6 Beav., 486; Chapman *vs.* Tibbits, 33 N. Y., 289; Smith *vs.* Debrell, 31 Texas, 239.)

On principle and authority, when an interest-check is issued to an infant, the right to collect, if not the legal title, passes *by operation of law* to his guardian. (Draft case, 1 Lawrence, Compt. Dec., 23; Safford's case, *Id.*, 285.)

In some cases and in some States the legal title and right of action are in the guardian, while in others they are in the infant, but subject to the control of the guardian. (Schouler's Domestic Relations, 462; Pond *vs.* Curtiss, 7 Wend., 45; Truss *vs.* Old, 6 Rand., 556; Bacon *vs.* Taylor, Kirby, 368; Beecher *vs.* Crouse, 19 Wend., 306; Fuqua *vs.* Hunt, 1 Ala., 197; Sutherland *vs.* Goff, 5 Porter, 508; Field *vs.* Lucas, 21 Geo., 447; Jolliffe *vs.* Higgins, 6 Munf., 3; Baker *vs.* Ormsby, 4 Scam., 325; Thacher *vs.* Dinsmore, 5 Mass., 299; Thomas *vs.* Bennett, 56 Barb., 197; Barnet *vs.* Commonwealth, 4 J. J. Marsh., 389; Carskadden *vs.* McGhee, 7 Watts & Serg., 140; Hutchins *vs.* Johnson, 12 Conn., 376; Hutchins *vs.* Dresser, 26 Maine, 76; Hoare *vs.* Harris, 11 Ill., 24; Fox *vs.* Minor, 32 Cal., 111; Stratton's case, 1 Johns., 509; Totten's appeal, 46 Pa. St., 301; Winslow *vs.* Winslow, 7 Mass., 96; Longmire *vs.* Pilkington, 37 Ala., 296; Mebane *vs.* Mebane, 66 N. C., 334; Anderson *vs.* Watson; 3 Met., [Ky.], 509; Hines *vs.* Mullins, 25 Geo., 696.)

The *parent* has no rights over the child's general property. (Schou-

ler's Dom. Rel., 350; Keeler *vs.* Fassett, 21 Vt., 539; Jackson *vs.* Combs, 7 Cow., 36; Miles *vs.* Boyden, 3 Pick., 213; Cowell *vs.* Daggett, 97 Mass., 434; Kennagham *vs.* McLaughlin, 3 Monr., 30; see Seden's appeal, 31 Conn., 548.)

If, in any State, the parent of an infant may by law be authorized, without other guardianship, to collect interest-checks, the right to do so would be respected on production of evidence of the law and other requisite facts.

The guardian is, therefore, generally the proper person to make the indorsement and collect money due on such checks.

For this purpose, the guardian should produce, and file in the First Auditor's office, (1) a certified copy of his letters of guardianship, or, if there be none, then of his appointment, with evidence that he has given bond, (State *vs.* Sloane, 20 Ohio, 327; Maxsom *vs.* Sawyer, 12 Ohio, 195;) (2) evidence of the identity of his ward as the infant in whose name the bonds are registered; and (3) evidence that his authority as such guardian still continues.

This latter evidence is required, because (1) it may not be otherwise known whether the ward has reached majority or died, and (2) in some, perhaps most, of the States the authority of guardians ceases, and especially if not testamentary guardians, at a certain age of the ward, who, on reaching it, has a right to elect a person to be duly appointed guardian; and (3) the marriage of a female ward will, under the laws of some of the States, if not generally at common law, take from the guardian the right to collect interest and vest it in the husband. (Barnett *vs.* Com., 4 J. J. Marsh., 389; 2 Bishop on Married Women, 525; Nicholson *vs.* Wilbour, 13 Ga., 467; Bartlett *vs.* Cowles, 15 Gray, 445; Cumming's appeal, 1 Jones, Pa., 272; *Ex parte* Post, 47 Ind., 142; Fegan case, 45 Cal., 147.)

This rule is doubtless changed in some of the States, either expressly or by the effect of statutes relating to the property of married women.

When the age is reached which gives the infant a right to select a guardian, the authority of the former guardian ceases, and his acts thereafter will not bind the ward. (Perry *vs.* Brainard, 11 Ohio, 442.)

The evidence is to be filed in the office of the First Auditor. This officer reports the United States Treasurer's accounts quarterly to the First Comptroller, who, in adjusting them, is required to pass upon the validity of the vouchers.

The evidence should show how long the authority of the guardian by law continues.

It is possible that there may be cases in which an infant might law-

fully indorse a check in payment of "necessaries," but the Government cannot be called on to inquire into or determine the facts necessary to make such indorsement valid.

It must be understood, that if a bond is registered in the name of an infant, without notice to the Government of the infancy, payment of interest-checks on the indorsement of the infant, to him or other holder, can give no right to reclamation against the Government. As the Secretary of the Treasury is the executive officer as to loans, notice to charge the Government can only be given to *him*. The act of a party other than the infant in causing bonds to be so registered without notice of the infancy, is such a representation of capacity to indorse that an infant cannot repudiate it without notice to the Government. When an infant accepts the ownership of bonds so registered, it must be with all the consequences of such want of notice; one of which is, that the Government cannot be held liable for doing what the agent, by his act, necessarily authorized to be done. To hold it to such liability would, when it was not chargeable with *laches*, operate as a fraud on the Government. In like case with such implied representation of capacity to indorse, an adult person would, by his act, for himself assert a right to indorse in his own name; and he would be estopped by every principle of reason from denying such right. When he acts for an infant, the latter accepts the act *cum onere*—subject to a similar estoppel. (Montgomery case, 5 Ct. Cls., 98.)

Any other rule would render it impracticable for the Government successfully to carry out the loan laws and protect the Treasury from loss. Public policy, the necessities of the public service, the *salus populi suprema lex*, all require, that in such case, where the Government has been guilty of no wrong, it should not suffer. Natural persons dealing with those whose condition can be readily ascertained may, without serious inconvenience, be held liable for paying notes or bills to infants; but it is impossible for the Government to undertake to make such inquiry all over the world, where interest-checks are sent to meet maturing obligations.

The rule now adopted results, also, from the doctrine that, where one of two innocent parties must suffer, the loss shall be on him through whose act or omission it occurred.

It also results from the terms of the contract of the Government in the loan laws and the bonds. If it be said that similar forms of contract impose on natural persons the duty of paying, not to infants but their guardians, it is sufficient, in reply, to say that the Government is not subject to the ordinary laws applicable to its citizens. The Govern-

ment is not included in a statute unless expressly named, and assumes none of the ordinary obligations of citizens arising from the common law, beyond those demanded by *public convenience*, usage, and justice. (Richey's case, 1 Lawrence, Compt. Dec., 107; Stephani's case, *Id.*, 35; U. S. *vs.* Bank U. S., 5 How., 382; Vermilye *vs.* Adams Express, 21 Wall., 138; 7 Op. Att.-Gen., 599; 8 Op., 1.)

The same principles apply in a case where an infant causes bonds to be registered in his own name. Having power to do this, when the Government accepts the obligation to pay, in reason and justice it only undertakes to pay on such evidence as it has and to the party apparently entitled thereto.

It is more reasonable to require parents and guardians to look after the interest of infants than to require the Government to do so, which would be utterly impracticable in the absence of notice of the fact of infancy.

It must be understood, also, that when the Government employs minors in its service, payments of compensation made to them can give no right of reclamation to a parent-guardian, or to the minor on his arriving at majority, because the assent of the parent or guardian to such employment must be conclusively presumed while the employment is permitted by him to continue. And when the employment is in pursuance of law, and payment made accordingly, no further claim can exist. (1 Blackst., 453; 2 Kent, 193; Schouler's Dom. Rel., 2d ed., 344, 367; Reeve's Dom. Rel., 290; Jenness *vs.* Emerson, 15 N. H., 489; Campbell *vs.* Cooper, 34 N. H., 49; Cloud *vs.* Hamilton, 11 Hemph., 104; Armstrong *vs.* McDonald, 10 Barb., 300; Snedeker *vs.* Everingham, 3 Dutch., 143; Everett *vs.* Sherfey, 1 Iowa, 356; Smith *vs.* Smith, 30 Conn., 111; Kauffelt *vs.* Moderwell, 21 Pa. St., 222; Mason *vs.* Hutchins, 32 Vt., 780.)

The checks issued by the Government in payment of interest due to infants should therefore be delivered and paid only to the proper guardians of the infants.

TREASURY DEPARTMENT,

First Comptroller's Office, January 9, 1881.

IN THE MATTER OF THE RIGHT OF THE SUPERINTENDENT OF THE MINT AT PHILADELPHIA TO PROVIDE WINES AND OTHER LIQUORS, AT THE EXPENSE OF THE GOVERNMENT, FOR THE ENTERTAINMENT OF THE BOARD OF ASSAY COMMISSIONERS.—LUNCH CASE.

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1. The reasonably necessary expenses of the Assay Commission, authorized by section 3547 of the Revised Statutes, may properly be paid from the appropriation for "incidental and contingent" expenses of the Philadelphia Mint, no law having otherwise *specifically* provided for such payment.
 2. If the work of the Commission can be facilitated by furnishing lunches and meals at the Mint, they may be so furnished, to be paid from said fund.
 3. Wines and liquors, for the personal use as a beverage of the members of the Commission, are not such articles of necessity as to make the cost thereof a proper charge on said fund.
 4. The expenses of a dinner, given as a treat or mere act of hospitality, cannot properly be paid from said fund.

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
Washington, D. C., January 10, 1881.

SIR: I acknowledge the receipt of your letter of the 5th instant, stating that, for many years past, it has been the custom at the annual meeting of the Board of Assay Commissioners at the Philadelphia Mint, in order that no interruption should occur in the work, to provide *lunches*, and at the close of the operation, which runs usually well into the evening, a *dinner*, the expenses of which have been paid from the appropriation for the *contingent expenses* of the Philadelphia Mint; that no *specific* appropriations have ever been made for the expenses of the Commission; that payment from that appropriation seems to you proper and necessary; and that, if my opinion concurs with yours, you will instruct the Superintendent of the Mint at Philadelphia to make the "*customary preparations*."

The duties of the assay-commissioners are prescribed by section 3547 of the Revised Statutes, as follows:

"§ 3547. To secure a due conformity in the gold and silver coins to their respective standards of fineness and weight, the judge of the district court for the eastern district of Pennsylvania, the Comptroller of the Currency, the assayer of the assay-office at New York, and such other persons as the President shall, from time to time, designate, shall meet as assay-commissioners, at the Mint in Philadelphia, to examine and test, in the presence of the Director of the Mint, the fineness and weight of the coins reserved by the several mints for this purpose, on

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the second Wednesday in February, annually, and may continue their meetings by adjournment, if necessary. If a majority of the commissioners fail to attend at any time appointed for their meeting, the Director of the Mint shall call a meeting of the commissioners at such other time as he may deem convenient. If it appears by such examination and test that these coins do not differ from the standard fineness and weight by a greater quantity than is allowed by law, the trial shall be considered and reported as satisfactory. If, however, any greater deviation from the legal standard or weight appears, this fact shall be certified to the President; and if, on a view of the circumstances of the case, he shall so decide, the officers implicated in the error shall be thenceforward disqualified from holding their respective offices."

There is no law which specifically provides for the expenses of the commission. The reasonably necessary expenses, however, are a proper charge, payable out of the fund appropriated for the Philadelphia Mint, as provided by the act of June 15, 1880, (Laws, 223,) which appropriates a sum "for *incidental* and contingent expenses." This is somewhat more comprehensive than a mere contingent fund. If the work of the commission can be facilitated thereby, lunches may properly be furnished. Thus, if the work is such that the commission cannot properly leave the mint building in which it is conducted and a lunch be required, it is lawful to provide it. The work may be such that to leave it would be attended with loss of material or the interruption of tests, which cannot be arrested in their progress without loss. If the work of the commission is such that it may seem probable that it will run so late into the evening that dinner cannot be conveniently procured at the usual lodgings of the members, it may be provided in the mint building, or elsewhere, on the principle already stated. You refer to the "*customary preparations*" for lunch and dinner. It is a matter of history that through a long series of years there has been provided, at the conclusion of the work of the commission, a dinner, at which wines and other liquors have been served. These are not such articles of necessity as to make them chargeable on a contingent fund; nor is a dinner given as a mere act of hospitality or a treat so chargeable. Public duties are to be performed on business principles. *Citizens* have a right to indulge in hospitality. Government officers cannot do so at the public expense. The ruling herein made has no reference to any moral question involved in the use of wines or liquors, but is based on the legal use of the public money. Executive officers, in the performance of duties required by law, are to execute the law, and not to prescribe officially the moral rights or duties of citizens arising from considerations other than the proper meaning of the laws. Individual judgment and personal liberty are rights inherent in every American citizen.

The duty of every executive officer faithfully to observe and execute the laws is so sacred and essential to public justice that no departure from it is to be tolerated.

The payments from the fund for incidental and contingent expenses of the Philadelphia Mint will be controlled by the principles herein stated.

Respectfully,

WILLIAM LAWRENCE.

Hon. HORATIO C. BURCHARD,

Director of the Mint.

IN THE MATTER OF THE CHARACTER OF THE APPROPRIATION MADE BY CONGRESS FOR IMPROVING AND OPERATING THE ST. MARY'S FALLS CANAL.—CONGER'S CASE.

1. The act of June 14, 1880, (21 Stats., 189,) does not make a *permanent specific* appropriation to pay the "expenses of operating and keeping * * * in repair" the St. Mary's River Canal, or public works thereon.
2. The *Canal case* (1 Lawrence, Compt. Dec., 141) and *Bundy's case* (*Id.*, 184) re-examined and affirmed.
3. The act of June 14, 1880, considered as furnishing an example of the rule that one part of a statute may be construed by reference to another.
4. Where the language of a statute and the appropriate elements of *interpretation* clearly show its meaning, aids to *construction* cannot properly be resorted to.

The act of Congress approved June 14, 1880, (21 Stats., 180, 189,) entitled "An act making appropriations for the construction, repair, completion, and preservation of certain works on rivers and harbors, and for other purposes," after making sundry appropriations, contains one, with legislation added thereto, as follows:

"Improving and operating Saint Mary's River and Saint Mary's Falls Canal, two hundred and fifty thousand dollars. And the Secretary of War is hereby authorized to accept on behalf of the United States from the State of Michigan the Saint Mary's Canal and the public works thereon: *Provided*, Such transfer shall be so made as to leave the United States free from any and all debts, claims, or liability of any character whatsoever, and said canal after such transfer shall be free for public use: *And provided further*, That after such transfer the Secretary of War be, and hereby is, authorized to draw from time to time his warrant on the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair."

The canal and public works referred to in this provision are all designed to be operated together. The Saint Mary's canal and the public works thereon were constructed by, and kept in charge of, officers of

the State of Michigan, under the laws of which tolls were charged on vessels passing through the canal and locks. Appropriations were from time to time made by Congress for the improvement of the river and canal in the general interests of commerce; and the construction of an additional and larger lock, which is not yet completed for use, was begun by the United States. Over this construction the State exercised no control. It is adjoining those of the State, and constituted a part of the same general improvement.*

The expenses for building the original canal and locks were paid out of funds obtained from the sale of land granted for that purpose by the General Government to the State; and the latter was authorized to control and operate the canal and locks on condition that no more tolls should be charged than should be necessary to operate and keep them in repair. The transfer to the United States authorized by the act of June 14, 1880, has not yet been proffered by the State, and therefore not accepted by the Secretary of War.

Hon. Omar D. Conger, Hon. Jay A. Hubbell, and other Representatives in Congress, applied, February 14, 1881, to the First Comptroller for an opinion on the question as to whether the provision above cited makes a permanent appropriation "to pay the actual expenses of operating and keeping said canal [and the public works thereon] in repair."

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

The question presented is substantially decided in principle in cases heretofore reported. (Canal case, 1 Lawrence, Compt. Dec., 141; Bundy's case, *Id.*, 184; see remarks of Hon. Albert S. Willis, House Reps., Feb. 15, 1881; Ex. Doc. No. 17, 3d Sess. 46th Cong.) It is not necessary to repeat the reasoning of those cases.

In reference to the *rules* of the Senate and House of Representatives, referred to in Bundy's case, *supra*, it may be proper to say that, as applied to the act of May 18, 1880, referred to in the Canal case, they aided in its construction.

They would not, perhaps, apply in the construction of a "*river and harbor*" appropriation act, because the bill for making such appropria-

* The Annual Report of the State Superintendent and Collector of December 1, 1880, says: "In consideration of the fact that the State was not going to use the material on hand this winter in the construction of the guard-gates, we have allowed the engineer in charge of the Government work, Mr. Noble, to use such of the material as he needed in the prosecution of his work, the consideration being that the interests of the State regarding the same should be recognized in the pending negotiations of transfer, or a return of the material in case it was desired." And see the Annual Report of G. Weitzel, Major of Engineers, October 19, 1878, being Appendix D of the Annual Report of the Chief of Engineers.

tions, alone, is probably not "a *general* appropriation bill," within the meaning of those rules. (See proceedings House Reps., February 15, 1881, decision of Chairman Carlisle.)

This is the interpretation generally given to them. They would not, therefore, necessarily affect the interpretation of the act of June 14, 1880.

It is quite manifest that no appropriation is made for the St. Mary's river or canal beyond the one *annual* appropriation of \$250,000 contained in the act of June 14, 1880.

a. This act does not, in respect of the "expenses of operating and keeping said canal in repair," mentioned in the last proviso of the act quoted in the statement of the case, employ the *usual words* for making an appropriation.

b. The time had not arrived when an appropriation for such expenses was needed, and it was not certain that it ever would come, since the State might not agree to a cession to the United States. In any event it was not probable that a cession would be made before Congress would again assemble.

c. No *permanent specific* appropriation had ever been made for the St. Mary's river or canal; and no other or greater reason appears for such appropriation *since* than prior to this act.

d. It has never been *usual* to make permanent specific appropriations for rivers or canals of similar character.

e. The provisions relating to the river and canal show that Congress did not intend to make a permanent appropriation.

The appropriation made of \$250,000 is *annual*, not *permanent specific*. If the provision following this appropriation clause could be construed as permanent, then, by its express terms, it only applies, at most, to the "canal and the public works thereon" previously *owned and controlled by the State*.

A *portion of the locks* was constructed by the authority of Congress, and never was under the control of the State. The locks constructed by the State, and that under the authority of Congress, are contiguous. They constitute a part of one system: one set for large, and one for small, vessels. It is by no means probable that Congress intended to provide a permanent appropriation for the former State locks and canal, while leaving a portion of the canal and larger locks without such appropriation. Yet this would be the result if the law should be construed as making a permanent appropriation.

If there be a permanent appropriation, it grows out of the authority given to the Secretary of War "to draw from time to time his warrant

on the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair." What canal? Evidently the canal which was to be transferred by the State to the United States. If there be a permanent appropriation, it is made only by *implication*.

But an appropriation by implication should, by every principle of reason, be strictly construed. Such construction would limit it to the "canal," since neither "the public works thereon" nor the river are named in the clause authorizing the Secretary of War to draw his warrant on the Secretary of the Treasury, &c.

If, however, this provision was designed, as it clearly was, to give the Secretary of War authority to accept a cession from the State, and to declare that he is the officer who shall have charge of the work of "operating and keeping" the canal and works "in repair," then it is entitled to a more liberal construction; and, by the aid of this, the Secretary of War can be held to be *the officer* charged with the duty of "operating and keeping said canal" in repair, because *this* duty is named, and by *implication* he is also charged with the duty of keeping in repair the "public works thereon," which, though not named in this clause, are necessarily within the policy and reason of the act, the necessities of the case, and hence the purpose of Congress.

It directs *how* the money, *when thereafter appropriated*, shall be procured. This, possibly, may not be necessary, in view of other laws; but it was deemed proper for greater certainty. (Rev. Stats., 231, 3673, 3717; act June 14, 1880, 21 Stats., 180.)

The appropriations for rivers and harbors are generally made in acts which declare that they shall be "expended under the direction of the Secretary of War." In the light of the care shown in the act of June 14, 1880, to make specific provision for the issuing of a warrant to remove all doubt as to the effect of the word "warrant" in section 3673 of the Revised Statutes, it cannot be supposed that Congress, thus cautious, made a permanent specific appropriation by inference. Whatever was intended to be authorized was expressed in no equivocal words.

The four purposes *clearly* named—(1) authority to receive a cession, (2) authority to operate and keep in repair, (3) authority to draw money, (4) freedom from tolls—are sufficient to justify the law and satisfy its words and objects, without *adding* a fifth, implied purpose to make, by forced construction, a generally very objectionable form of appropriation, with no language employed to justify it. The first clause of this act *uses the proper words of appropriation*. (21 Stats., 180; Rev. Stats., 11.)

This clause shows that Congress was not dealing with appropriations by *inference*.

The act contains other *inherent evidence* that no permanent appropriation was intended to be made by the provision above cited.

One section or part of an act may be *interpreted* by reference to another. (Sedgwick, Stat. and Const. L., 199, 226; *District vs. Dubuque*, 7 Clarke, [Ia.,] 262; 6 Cal., 47; 31 Cal., 240; 28 Vt., 354; 10 Rich. Law, 376; *Com. vs. Duane*, 1 Binn., 601; 66 Pa. St., 99; *Scott vs. State*, 22 Ark., 369; *Davy vs. Burlington*, 31 Iowa, 553; 2 Daly, 66.)

This is only an enlargement of the maxim, *noscitur à sociis*.

Interpretation declares the meaning of an act from what is found in it; *construction*, from matters outside of it. These terms, though often used interchangeably as applied to statutes, are different in signification. *In* and *con* are different. *Inter-pretari* and *con-structio* express different shades of thought. (Sedgwick, Stat. and Const. L., 199, 201; Curwen's Introd. to 1 Curwen's Ohio Stat.)

The general usage of employing proper words of appropriation is, as a part of the history of legislation, one of the proper elements of construction.

In reference to this statute, the internal evidences of its purpose are so conclusive as to render the means for *construction* unnecessary, if not improper.

Where the language of a statute and the appropriate elements of *interpretation* clearly show its meaning, the aids to construction cannot properly be resorted to. (*Scott vs. Reed*, 10 Pet., 524; *Brewer vs. Blougher*, 14 Pet., 178; *Potter's Dwaris*, 183, 197; Sedgwick, Stat. and Const. L., 191; *L. L. and G. R. Co. vs. U. S.*, 92 U. S., 751.)

It is a maxim that "it is not allowable to interpret what has no need of interpretation."

Lord Coke has declared that the rule which ascertains the meaning of a statute from its language is *benedicta expositio*. (2 Inst., 11, 136, 181; case of *Leases*, 5 Rep., 6.) *Optima statuti interpretatrix est* ("omnibus particulis ejusdem inspectis) *ipsum statutum. Quando verba et mens congruunt, non est interpretatio.*

As a means of interpretation, the last section of the act, as follows, becomes material:

"SEC. 4. Whenever hereafter the navigation of any river, lake, harbor, or bay, or other navigable water of the United States, shall be obstructed or endangered by any sunken vessel or water-craft, it shall be the duty of the Secretary of War, upon satisfactory information thereof, to cause reasonable notice, of not less than thirty days, to be given, personally or by publication, * * * to all persons interested * * * of the purpose of said Secretary, * * * to cause the same

to be removed. If such sunken vessel or craft and cargo shall not be removed by the parties interested therein as soon as practicable * * * the Secretary of War shall proceed to remove the same. Such sunken vessel or craft and cargo * * * shall * * * be sold for cash, and the proceeds of such sales shall be deposited in the Treasury of the United States to the credit of a fund for the removal of such obstructions to navigation, under the direction of the Secretary of War, and to be paid out for that purpose on his *requisition* therefor. The provisions of this act shall apply to all such wrecks whether removed under this act or under any other act of Congress. Such sum of money as may be necessary to execute this section of this act is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, to be paid out on the *requisition* of the Secretary of War."

Here is a *permanent specific appropriation*. This shows that Congress, in passing the act, did not intend to create such appropriations by *implication*. It shows that an *authority* given to the Secretary of War to draw *requisitions* for a specified purpose was not regarded as an *appropriation*.

In this connection it may be proper to state that the word "*warrant*," used in the second *proviso* to the item for the Saint Mary's River and Saint Mary's Falls Canal, means "*requisition*." (Bender's case, 1 Lawrence, Compt. Dec., 338.)

TREASURY DEPARTMENT,

First Comptroller's Office, February 18, 1881.

IN THE MATTER OF THE CLAIM OF A DECEASED POSTMASTER'S EXECUTRIX TO THE SALARY OF THE OFFICE FOR THE PERIOD IN WHICH ITS DUTIES WERE DISCHARGED BY THE POSTMASTER'S SURETIES.—PENN YAN CASE.

1. The "regulation" of the Post Office Department is valid which authorizes a *surety* of a deceased postmaster, when there is no assistant, to perform the duties of postmaster until a successor is appointed and takes possession.
2. The legal representative of a deceased postmaster is not entitled to the salary of the office during the time a *surety* may perform the duties.
3. The act of March 3, 1879, (20 Stats., 362, sec. 31,) gives such *surety*, while so performing the duties "by authority of the President," a right to the salary.
4. When a *surety* so performs the duties, it is presumed that he acts "by authority of the President," since he acts in pursuance of a "regulation" presumed to have the sanction of the President.
5. The "regulation" is a sufficient appointment.
6. The *surety* in such case is virtually an *officer*. His character is determined by the authority under which he acts and the nature of his duties, and not by the terms by which he is described in the law or regulations.

7. The estate of a deceased postmaster is, by force of the statute, (Rev. Stats., 3836,) liable for the official acts of and postal revenues received by a surety while performing the duties of postmaster.
8. Under the "regulations," a surety, when performing the duties of postmaster, renders accounts to the Post Office as well for the deceased postmaster as for himself.
9. The right to receive money or to control that received on deposit at the decease of a postmaster passes to the successor in office, or persons performing the duties. The legal representative has no right to take or draw it.
10. The Government is liable to the estate of a deceased postmaster for salary due at the time of his death. Hence, if a surety performing the duties of postmaster takes postal revenues on hand at the time of the decease, and fails to pay such salary, the Government is bound to pay it.
11. The office of assistant postmaster exists by virtue of regulations authorized by law, and is recognized by statute.
12. The "regulations" give the assistant, after the decease of the postmaster, authority to act, thereby changing the common-law rule that the authority of an assistant dies with his principal.
13. The assistant appointed by a postmaster is not an *officer*, but nevertheless discharges such official duties as the postmaster may assign to him.
14. Such assistant is not paid for his services by the Government. His compensation rests on contract with his employer. The employer, or, in the event of death, his legal representative, is alone liable for payment.

APPEAL FROM THE DECISION OF THE AUDITOR OF THE TREASURY
FOR THE POST-OFFICE DEPARTMENT, (SIXTH AUDITOR.)

In November, 1877, Charles E. Miller was duly appointed by the President as postmaster at Penn Yan, New York; and he served as postmaster until March 11, 1879, when he died.

Charles D. Welles and others were sureties on Miller's official bond.

March 11, 1879, one of the sureties, Welles, took possession of the post office, by virtue of section 3836 of the Revised Statutes, and the regulations under it, and conducted its business until June 30, 1879, when a regularly appointed postmaster took charge of the office. In the account for the quarter ending June 30, 1879, Welles credited himself with \$525, one quarter's salary,* which was allowed in the final adjustment and settlement, by the Sixth Auditor, on his report of the general account, which was kept as between the United States and Charles C. Miller, from 1877 to June 30, 1879; no notice being taken of the death.

February 9, 1880, the petition of Rebecca Miller, executrix of said Miller, addressed to the Postmaster-General, states the facts, and asks that she may be paid the sum due the estate of the late postmaster on account of salary for said quarter; or that the Post-Office Department require said Welles to pay her said sum of \$525.

An appeal was taken from the Auditor's settlement of the account for said quarter as follows:

"To the AUDITOR OF THE TREASURY FOR THE POST-OFFICE DEPARTMENT.

"*Take notice*: Mrs. Rebecca Miller, executrix of Charles C. Miller, deceased, late postmaster at Penn Yan, Yates County, N. Y., appeals from the settlement and adjustment of the account and compensation of said Charles C. Miller, as postmaster aforesaid, as settled in your office for the quarter ending the last day of June, 1879, to the First Comptroller of the Treasury.

"Dated 20th March, 1880.

"D. MORRIS,
"Counsel for Appellant."

It appears by sufficient evidence that said Rebecca is *executrix* of the estate of the deceased postmaster.

D. Morris, counsel for the appellant, claims that Welles should account to, and pay over to, the Department, for the executrix, *all* the moneys which came to his hands; and that the redress sought can be granted by the Post-Office Department only:

I. Under section 1163 of the Postal Laws, after the death of a postmaster, and until a successor is duly commissioned, all accounts are in the name of the deceased, and the proceeds or salary go to the representative of the deceased. There is no salary given to any but postmasters (sec. 135) and postmasters *pro tem.* (sec. 163.) Mr. Welles is neither of these.

II. Section 111 permits or authorizes a surety, upon the death of a postmaster, to take charge of the office. This is not compulsory; it is only a privilege. The *status* of the surety and his co-sureties remains the same as before. The mode of keeping and auditing the accounts, and the disposition of the proceeds of the office, are unchanged. The surety, by taking charge of the office, does not become the agent or *employé* of such representative; there is no privity whatever between them, the surety is independent as far as the representative is concerned. The former is the agent, under the law, of the Post-Office Department. The co-sureties are bound with him for any default or neglect of duty on his part as actually as they are for any default or neglect of duty on the part of their principal. There is a privity between him and the Department.

There is no provision by which it is made his duty to account to or in any way recognize the representative of the deceased in conducting the office, or in the disposition of its proceeds. The Department alone has power to direct and control him.

III. What are the duties of a regularly-commissioned postmaster, and of a surety acting as postmaster?

The former must account to the Department for all of the proceeds of the office; but he is permitted to retain his salary. The latter must account in like manner, but he can retain nothing; he has no salary, his are voluntary services; he takes nothing, save self-protection, for his services.

IV. When Mr. Welles made his report at the close of the quarter ending June 30, 1879, it was his duty to pay the entire avails of the

post office over to the Department; but the Department made up the account, and balanced it, as though Mr. Miller was alive and had retained his salary; whereas the acting postmaster, without any warrant for it, retained \$525 as due to him for salary. The Department could then have required him to pay over the \$525, and it can do so now. The representative of the deceased was not a party to this transaction.

V. What is the remedy?

I hardly need suggest that the Department may call on Mr. Welles for this deficiency of \$525; and, in default of payment, the bond of Mr. Welles and his co-sureties can be resorted to as readily and certainly as if the default arose from the neglect of Chas. C. Miller. Sureties are always responsible until a successor is commissioned, whether the office be conducted by a deputy or a surety, as acting postmaster.

That no action can be maintained where there is no privity between the parties thereto, is well-settled law. Hence Mrs. Miller is remediless unless the Department shall aid her.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The several provisions of law which more particularly affect the questions presented for decision are as follow:

"Postmasters of the first, second, and third classes shall be appointed * * * by the President by and with the advice and consent of the Senate, and shall hold their offices for four years * * *; and postmasters of the fourth class shall be appointed and may be removed by the Postmaster-General." (Act July 12, 1876, sec. 6; 19 Stats., 80.)

"Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security * * * conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the Department * * *. On the death, resignation, or removal of a postmaster, his bond shall be delivered to the Sixth Auditor." (Rev. Stats., 3834.)

"Whenever the office of any postmaster becomes vacant, the Postmaster-General or the President shall supply such vacancy without delay, and the Postmaster-General shall promptly notify the Sixth Auditor of the change; and *every postmaster and his sureties shall be responsible under their bond for the safe-keeping of the public property of the post-office, and the due performance of the duties thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified, and has taken possession of the office*; except that in cases where there is a delay of sixty days in supplying a vacancy, the sureties may terminate their responsibility by giving notice, in writing, to the Postmaster-General, such termination to take effect ten days after sufficient time shall have elapsed to receive a reply from the Postmaster-General; and the Postmaster-General may, when the exigencies of the service require, place such office in charge of a special agent until the vacancy can be regularly filled; and when such special agent shall have taken charge of such post-office, the liability of the sureties of the postmaster shall cease." (Rev. Stats., 3836.)

The act of July 12, 1876, (19 Stats., 80; secs. 5, 7, and 8,) classifies postmasters in four classes, and declares that the respective compen-

sations of postmasters of the first, second, and third classes "shall be annual salaries, assigned in even hundreds of dollars," fixed in amount by a percentage on the revenues of the office.

"The salary of a postmaster, and such other expenses of the postal service, authorized by law as may be incurred by him, * * * may be deducted out of the receipts of his office." (Rev. Stats., 3861, 3862.)

The act of March 3, 1879, (20 Stats., 362, sec. 31,) declares that—

"Any person performing the duties of postmaster, by authority of the President, at any post-office where there is a vacancy for any cause, shall receive for the term for which the duty is performed the same compensation to which he would have been entitled if regularly appointed and confirmed as such postmaster; and all services heretofore rendered in like cases shall be paid for under this provision."

The net revenues of all post offices, after deducting salaries and expenses, are deposited with the depositary and draft officers, and with the Treasurer of the United States and the assistant treasurers. They are drawn out by warrants and drafts in favor of mail contractors and other creditors of the Department. (See 1 Lawrence, Compt. Dec., *Appendix*, ch. X.)

Section 161 of the Revised Statutes provides that—

"The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

Under this authority the Postmaster-General has made REGULATIONS, as follows:

"SEC. 111. Whether the appointment be from the President or the Postmaster-General, in the event of death, the responsibility of the sureties will continue for the fidelity of the person left in charge of the post-office, until a successor is appointed and qualified, and has taken possession of the post-office; and they or any one of them may perform the duties of postmaster until a successor is appointed and takes possession. The person performing such duties must, before entering on the discharge thereof, take the required oath."

"SEC. 1163. In case of the death of a postmaster, the assistant, deputy,* or the sureties may render the account to and including the day upon which the new postmaster enters upon the discharge of his duties. Such account will be duly audited, compensation allowed in the settlement of the same, and credited to the account of the deceased postmaster."

* There does not seem to be any law specifically authorizing a *deputy* of a local postmaster. Formerly, all postmasters were regarded as deputies of the Postmaster-General. (U. S. *vs.* Le Baron, 19 How., 73; *Boody vs.* U. S., 1 W. & M., 150; *Jones vs.* U. S., 7 How., 681.) But the statute recognizes and thus authorizes deputies who may be appointed by postmasters. The usage is, in those cases respectively in which provision is made for the appointment and payment of postmaster's clerks, to designate a clerk as assistant postmaster; and he is paid as clerk. (Rev. Stats., 3440, 4048.) Clerks and assistant postmasters are required to take an oath of office. (18 Stats., 19.)

"SEC. 518. Precautions should be taken by each postmaster to appoint an assistant, to prevent the post-office from being left without a duly qualified person to perform its duties in case of the necessary absence, the sickness, resignation, or death of the postmaster." (See Rev. Stats., 3850.)

"SEC. 519. Each postmaster will forward the oaths of his assistant * * * to the First Assistant Postmaster-General."

Section 3850 of the Revised Statutes directs that—

"No postmaster, assistant postmaster, or clerk employed in any post-office shall be a contractor or concerned in any contract for carrying the mail."

This appeal presents questions of much importance to the Post-Office Department, to postmasters, and their sureties. Among them are these:

1. Is the executrix entitled to the salary for the quarter ending June 30, 1879?

2. If not, is Welles so entitled?

The *law* (Rev. Stats., 3836) does not in express terms, but the post-office "regulations" do, declare that the surety on a postmaster's bond may, in the event of the death of the postmaster, "perform the duties of postmaster until a successor is appointed and takes possession."

No mere *necessity* can authorize a "regulation" either contrary to, or not authorized by, law; but this regulation is authorized as a means of executing that provision of section 3836 (Rev. Stats.) which holds a surety "responsible * * * for * * * the due performance of the duties" of the post office.

The laws relating to the Post-Office Department give and recognize large power to prescribe "regulations." Under them the office of a "regulation" generally is to prescribe *forms* and *modes* of transacting business authorized or required by law to be done; to prescribe such duties as may not be specifically pointed out by law, of subordinate officers and of agents who are, in terms or by necessary inference, authorized by law in such service; to determine the time and manner of performing all authorized public service, when not otherwise specified; and, generally, to adopt such means and agencies as may be necessary and proper to execute the purposes of a law.

Either manifest necessity, or convenience, is often a proper *test* of the validity of a regulation, because, when the law has required a service to be performed, it is not to be presumed that Congress has failed to authorize the use of the requisite agencies and means, when the law may fairly be construed as a warrant for them, either by its own terms or through appropriate regulations. Until a postmaster or special agent is appointed, no other person is authorized to perform the duties of the office; except the assistant, where there be one, or the surety.

The office of assistant exists only by inference, and not by positive law. (Rev. Stats., 3850.) But this statutory recognition authorizes the "regulations" in relation to assistants, which are in execution of the purpose of the law.

The authority of an assistant, like that of a deputy officer, derived from the appointment of his principal, would, on common-law principles, die with the principal. A deputy is generally a person who is authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter.

In general, ministerial officers can, at common law, appoint deputies (Comyns, Dig. *Officer*, D, 1,) to perform ministerial acts. (Abrams *vs.* Erwin, 9 Iowa, 87; McNair *vs.* Hunt, 5 Mass., 300.)

A deputy cannot generally act in his own name, for he derives all his authority from the officer who appoints him; and the latter is liable for the deputy's acts and neglects. (3 Dane, Abr. C., 76, *a* 2; Comyns, Dig. *Officer*, D; *Viscount*, B; Viner, Abr., 556; Arch. Civ. Plead., 68; 16 Johns., N. Y., 108.)

Under statutes authorizing deputies, these are frequently empowered to act in their own names as such.

In all cases where one is acting for another, and by his authority, the death of the principal works an immediate revocation of the authority, unless otherwise provided by statute.

When a power is revoked by death, the revocation takes place at once; and any subsequent act done under the power, though without notice of death, is void. (30 Vt., 11.)

Where a corporation, at the request of their registrar, appointed a deputy registrar to assist him: *Held*, that the authority of the deputy was determined by the death of the registrar. (Rex *vs.* Corporation of Bedford Level, 6 East, 356; Jones *vs.* Pugh, Salk., 465; 1 Ld. Ray, 660; Moor, 12; 2 Hale's P. C., 24; Cro. Car., 97, Sir Randolph Crew's case.)

An assistant postmaster, being appointed by a local postmaster and not by the "head of the Department," is not an *officer*. (U. S. *vs.* Germaine, 99 U. S., 508.)

His authority does not die with his principal, because the regulations have extended his authority until a successor or special agent takes charge.

In the absence of an assistant, a surety can, by "regulation," be authorized to act, because this is in execution of the purpose of the law; the authority follows as an incident of the provision of law which makes the surety "responsible * * * for * * * the due per-

formance of the duties" of postmaster; and it is recognized as valid by the act of March 3, 1879, in the clause relating to "any person performing the duties of postmaster by authority of the President."*

When a surety "performs the duties" by virtue of the "regulations," and so with the sanction of the Postmaster-General, it is presumed that he acts "by authority of the President;" that is, that the regulations are authorized by the President. (*Wilcox vs. Jackson*, 13 Pet., 498; *U. S. vs. Cutler*, 2 Curt., 617; *Williams vs. U. S.*, 1 How., 290; s. c., 5 Cr. C. C., 619; *Lockington vs. Smith*, Pet. C. C., 466; 7 Op., 453; *U. S. vs. Eliason*, 16 Pet., 291.)

It is not intended to say that all regulations are presumed to be the act of the President. The head of a Department is expressly authorized to make regulations as to the service of his Department. But when a regulation is necessary to execute some authority under the President himself, or by his direction or approval, and such authority, direction, or approval is found in the regulations of the head of a Department, these will, upon the authority cited, be presumed to be authorized by the President.

The exact status of the surety so acting is that of "any person performing the duties of postmaster."

He is not *postmaster eo nomine* nor *acting postmaster*, since the statute does not so designate him; but as he performs the duties of a postmaster, and is entitled to the salary, and derives his authority from an appointment of the "head of the Department" by a "regulation," he is an *officer*, and is amenable as such. His character is determined by the authority under which he acts and the nature of his duties, and not by what he is called.

He is a person performing the duties of a postmaster, and is practically an officer *de jure*, or at least *de facto*, although not technically an officer.

L—With the statement of these principles as somewhat preliminary, the direct question is to be met: Is the executrix entitled to the salary in question?

The answer is, clearly not.

1. A salary, like an office, is created and fixed by law, and can exist only in favor of those officers or persons to whom the law gives it. (*U. S. vs. Maurice*, 2 Brock., 96.)

* The Post-Office Regulations (sec. 111) say, that "in the event of death * * * they [the sureties,] or any one of them, may perform the duties of postmaster," &c.

If the sureties should be unable to agree as to the management, the President or Postmaster-General could doubtless direct as to this. A regulation, approved by the President, which would, in the absence of, and until, such direction, prescribe the order in which the sureties should have the right, might avoid some complications.

There is, as to postmasters, no common-law right to a salary.

There is no statute which gives to a legal representative of a deceased postmaster the right to the salary attached to the office.

A deceased person cannot be appointed or vested with the title to an office. Hence, by every principle of reason, when an officer dies, his title to the office ceases.

All the statutes relating to *vacancies* in office treat death as creating a vacancy.

Where there is a vacancy, the strict legal title cannot be in any one.

The right to a salary exists *in the officer*, and arises from the fact that it is "*his office*." Hence the statute says that the salary may be retained by the officer "out of the receipts of *his office*."

When the office ceases to be *his*, the salary must cease to be *his*. (Connor *vs.* Mayor, 1 Selden, 296.)

2. Neither the right to the office, nor to its salary, is in the legal representative. No law, statutory or common, so declares such right to be in the latter. (Merriam *vs.* Clinch, 6 Blatch. C. C., 11.) No law transmits the title to the office, or a right to the salary, by descent, devise, or distribution, to a legal representative. Every rule of reason and justice denies any such title or right.

There were rights to offices in England which passed as assets to a legal representative; but the National Government here recognizes no such right.* (Williams on Ex'rs, [673,] [1671,] 748, 1775, 6th Am. ed.; Reynel's case, 9 Co., 97 a; Schellinger *vs.* Blackerly, 1 Ves., sr., 347; Wentw. Off. Ex., 173, 14th ed.; Rennell *vs.* Bishop, 7 B. & C., 195; Potter *vs.* Chapman, Ambl., 98; 1 Burn, Ec. L., 240, 8th ed.)

* To a certain extent there may be a partial exception to this rule by force of *express law*, as follows:

The Revised Statutes provide as to marshals—

"SEC. 789. In case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specially removed, and shall execute the same in the name of the deceased, until another marshal is appointed, as provided in this chapter, and duly qualified. The defaults or misfeasances in office of such deputies in the meantime shall be adjudged a breach of the condition of the bond given by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for the defaults and misfeasances in office of such deputies, during such interval, as he would be entitled to if the marshal had continued in life and in the exercise of his said office until his successor was appointed and duly qualified."

Pursuant to this enactment, the practice of the accounting officers of the Treasury Department, when a marshal dies and the duties of his office are discharged by deputies, has been to continue the accounts of the deceased without rest and without change. The office is conducted in the name of the deceased, and the sureties on his official bond are held liable for any default on the part of the deputies. If, on the final adjustment of the accounts, balances be found due from the United States, they are paid to the legal representative of the late marshal; and it becomes his duty, according to the usage which has heretofore prevailed, to compensate the deputies for their services, and to settle their claims against the late marshal in accordance with the terms of agreements made between the latter and the deputies, in the same manner as the marshal would have been required to settle them if death had not occurred.

3. The executrix cannot collect the salary after the decease of the postmaster merely because the estate she represents is liable for the official acts of, and postal revenues received by, the surety while he is performing the duties of postmaster. Any claim founded on this reason is denied in *Merriam vs. Clinch*. (6 Blatch. C. C., 11.)

The law and regulations, in terms or by inference, fix the liability of the estate beyond the life of the officer, "until a successor has been duly appointed and qualified."

The surety, when performing the duties of postmaster, is not a "successor" within section 3836 of the Revised Statutes. The "public property" mentioned in that section includes postal revenues. All this seems clear from a consideration of the laws referred to and the purpose which they carefully manifest to protect the Government. (See *Merriam vs. Clinch*, 6 Blatch. C. C., 7.)

The liability of the estate arises by force of the statute and regulations; and that of the sureties, by force of the statute, the bond, and the regulations. But such liability has no connection with the salary. The liability cannot continue the office in the deceased officer or in his legal representative, and hence cannot continue in either a right to the salary.

4. The "regulations" declare that in case of death the surety may "render the account to and including the day upon which the new postmaster" enters upon his duties, and "such account will be duly audited, compensation allowed in the settlement of the same, and credited to the account of the deceased postmaster."

This is not a *law* giving a salary, or deciding *who* is entitled thereto. It is a regulation, having the force of law, which prescribes (1) a mode of making a return of postal revenues and expenses, (2) of auditing them, and (3) of *book-keeping*. Its effect is to be determined by its *purposes*. It would have been entirely competent to require that the surety should render the account in his own name, running back to the time covered by the last report of the deceased postmaster; but this mode of book-keeping could not deprive the estate of the deceased postmaster of the right to the salary up to the time of the death, and which right is fixed by law.

As the law fixes the amount of, and party entitled to, the salary, no regulation could change it. A regulation cannot legislate in opposition to a statute.

5. The right to money on hand at the decease of an officer goes to the *successor*, and not to the legal *representative*; and this confirms the

view that the latter is not to collect salary thereafter accruing. The Revised Statutes provide as follows:

"SEC. 3847. Any postmaster, having public money belonging to the Government, at an office within a county where there are no designated depositories, treasurers of mints, or Treasurer or assistant treasurers of the United States, may deposit the same, at his own risk and in his official capacity, in any national bank in the town, city, or county where the said postmaster resides; but no authority or permission is or shall be given for the demand or receipt by the postmaster, or any other person, of interest, directly or indirectly, on any deposit made as herein described, and every postmaster who makes any such deposit shall report quarterly to the Postmaster-General the name of the bank where such deposits have been made, and also state the amount which may stand at the time to his credit."

This section allows the postmaster, at his own risk, to make, in his official capacity, a deposit of public money with a bank. The words, "at his own risk," imply that the Government will look to him and his official bond for the payment of the money in case the bank fail, or, without this, may elect to look to him or his estate. The Government may also hold the bank liable. If the money is deposited to the credit of the United States, it can be drawn out by the creditor like any deposit to the credit of a third party.

In *Swartwout vs. Mechanics' Bank*, 5 Denio, N. Y., 555, it was *held*, that a bank keeping an account with a public officer, in his own name, with his official addition, is liable to him individually, unless it shows, by the account so kept, that it is liable to the Government.

In *Farmers', &c., Bank vs. King*, 57 Pa. St., 202, it was *held*, that, although a bank on receiving deposits becomes a debtor therefor, yet, if the depositor is an agent, when his principals assert their right to the money before its repayment, and give notice to the bank of their ownership, and of their unwillingness that the money should be paid to their agent, his right to reclaim it ceases.

When a postmaster makes, in his official capacity, a deposit of public money in a national bank which is not a designated depository, and does so with the consent of the United States, he assumes all risk in the matter. The bank, by the act of receiving a deposit from a postmaster "in his official capacity," has notice that he is the agent of the United States with regard to the moneys deposited. Hence, if the executor or administrator of the postmaster, or any person not specially authorized by the United States, should make a demand on the bank for the payment of such deposit, it would be the duty of the bank to refuse payment. The executor or administrator has power only to collect debts due to the decedent's estate; and, clearly, a deposit of public moneys does not constitute such a debt.

The fact that the sureties are responsible for all public moneys that came into the postmaster's hands which are not properly accounted for, does not create any contract between them and the bank, as the contract with the bank is to pay either to the principal or to the agent. In the lifetime of the agent the bank may pay him the deposit, if the principal (the United States) so directs; but after the agent's death the deposit remains subject to the order of the principal only.

Trust funds held by the decedent, which are kept separate, and come into the hands of his executor, are not assets. (*Trecothick vs. Austin*, 4 Mass., 16; s. p., *Robinson vs. Codman*, 1 Sum., 121; *U. S. vs. Cutts*, *Id.*, 133. For the liability of the administrator of the surety of a public debtor, see *U. S. vs. Primrose*, Gilp., 58; *Vaughan vs. Northup*, 15 Pet., 1.)

The administrator of a creditor of the Government, duly appointed in the State where he was domiciliated at his death, has full authority to receive payment, and give a full discharge of the debt due to the intestate. (*Vaughan vs. Northup*, 15 Pet., 6.)

In Morse on "Banks and Banking," 302, (2d ed.,) it is said:

"If a deposit account stands in the name of any person, not as an individual, but in an *official capacity*, upon his decease, or upon the cessation of his official character, the property in the deposit, and with this the right to draw checks against it, will pass to his successor in the office. Thus, a deposit account to the credit of one as executor does not pass to his own administrators upon his decease, but to the administrators *de bonis non* of the estate of the prior deceased. The bank will be discharged only by payment made to them." (*Allegheny Bank's appeal*, 48 Pa. St., 328; *Stair vs. New York National Bank*, 55 Pa. St., 364; *Farmers' and Mechanics' National Bank vs. King*, 57 *Id.*, 202; *Perry on Trusts*, secs. 287, 288, &c.)

"If a deposit be made in the name of a depositor as 'agent,' the principal may recover and hold it as against a creditor of the depositor who has attached it." (*Bank of Northern Liberties vs. Jones*, 42 Pa. St., 536.)

An examination of the cases will show that the principles thus stated are not in conflict with those stated in the cases to which reference has been made.

The result is, that the executrix is not entitled to collect any salary accruing in the office after the decease of the postmaster.

II.—Welles is entitled to the salary during the time he performed the duties of postmaster.

1. The act of March 3, 1879, is clear and conclusive. It seems to have been passed to meet this class of cases. It declares that "any person performing the duties of postmaster, by authority of the President, * * * where there is a vacancy for any cause, shall receive

for the term for which the duty is performed the same compensation" that a regularly appointed postmaster would be entitled to. Welles has satisfied the conditions of this act.

(1.) He was, during the period for which the executrix claims the salary attached to the office, the "person performing the duties of postmaster."

(2.) He performed them, as already shown, "by authority of the President."

a. It has been sufficiently shown that the "regulation" was for this purpose the act of the President.

b. As the *law* has given authority to the head of the Post-Office Department to make the "regulation," this, as *his act*, would be sufficient, if it were not for the express provision that the person performing the duties must act "by authority of the President;" because Congress *could* in *this mode* "vest the appointment" of a person to perform "the duties of postmaster" in the Postmaster-General, (Const., art. II, sec. 2, clause 2;) and, no particular *form of appointment* is required. (*Bow-erbank vs. Morris*, Wall. C. C., 119.)

c. Congress cannot *by law*, and without other appointment, designate persons as *officers* in the postal service. (Case of Dist. Atty., 16 Am. Law Reg., 786; *U. S. vs. Maurice*, 2 Brock., 96.)

The *law could*, without executive direction or authority, give to a surety the right to discharge the duties. (*Sheboygan vs. Parker*, 3 Wall., 93.)

It has in this case given such right, but only upon condition that the surety act "by authority of the President."

(3.) There was a "vacancy" in the office, caused by the death of the postmaster; and Welles performed the duties of the office during the period in question.

(4.) Welles is, therefore, entitled to the salary with which he has, in his account, credited himself; and the settlement and adjustment of the postmaster's account for the quarter ending June 30, 1879, made by the Auditor of the Treasury for the Post-Office Department, are affirmed.

TREASURY DEPARTMENT,

First Comptroller's Office, February 21, 1881.

IN THE MATTER OF THE RIGHT OF A DIPLOMATIC OFFICER OF THE UNITED STATES TO HIS SALARY DURING AN ABSENCE FROM HIS POST AS A SUBPENAED WITNESS BEFORE A COMMITTEE OF CONGRESS.—SEWARD'S CASE.

1. The law of nations is recognized by the Constitution as a part of the law of the land.
2. The duties of foreign ministers are defined by the law of nations, but those of American foreign ministers are subject to regulation or modification by treaty or act of Congress.
3. The salaries of ministers of the United States to foreign countries are wholly dependent on the legislation of Congress.
4. The post of duty of an envoy extraordinary and minister plenipotentiary, within the meaning of section 1742 of the Revised Statutes, is that place at which he may be required to be by *order* of the President for a purpose connected with his position or duty as such officer.
5. Whether a diplomatic officer of the United States can, without the authority of the President, be compelled to leave his post of duty abroad and appear as a witness before a court or committee of Congress—*quare*?
6. The provision of the statute which deprives diplomatic officers of salary in case of absence, changes the rule which would otherwise generally exist as to the right to compensation.

George F. Seward was consul-general of the United States at Shanghai, China, from October, 1861, until January 6, 1876; at which latter date he resigned, and became envoy extraordinary and minister plenipotentiary of the United States to China.

January 11, 1878, a committee was appointed, under a resolution of the House of Representatives of that date, to examine "into all the affairs of the" State and other Departments, with power to examine witnesses and send for persons and papers.

Charges having been made against Mr. Seward, relative to his official conduct *as consul-general*, the committee was engaged from February 5, 1878, to February 22, 1879, except during the recess of Congress, from June 20 to November 20, 1878, in investigating, *inter alia*, said charges.

The committee was also engaged in making inquiries as to the *official conduct of Mr. Seward as envoy*.

On the 27th of April, 1878, the committee, on the request of Mr. Seward's counsel, notified the Secretary of State that, "if the President should determine to grant Mr. Seward a leave of absence," for the purpose of appearing before the committee to testify and cross-examine witnesses, he should have the opportunity within a reasonable time, on

notice to him by telegram and on condition that he be required to bring his books.

The Secretary of State, on the 1st of May, by cable despatch, gave Mr. Seward, then on duty in China, *leave*, and, on the 8th of May, *directed* him to "start by first opportunity" to Washington.*

He left China on his return, June 7, and reached Washington November 15, 1878.

On the 19th of February, 1879, a *subpœna duces tecum* was issued and served on Mr. Seward by order of the committee.

He remained here and in the United States, by permission of the President, giving his attention to the investigation when practicable, until April 20, 1879, when, by direction of the President, he left the United States on the return to his post of duty, which he reached, in China, June 19, 1879. (For reports of committee, see House Rep., No. 117, 3d Sess. 45th Cong., Feb. 22, 1879; House Rep., No. 134, 3d Sess. 45th Cong., March 3, 1879; and House Rep., No. 141, 3d Sess. 45th Cong., March 3, 1879.)

Mr. Seward's accounts for salary, &c., having been presented to the Fifth Auditor and a balance stated, the First Comptroller has to decide the question whether Mr. Seward is entitled to the salary of his office during his absence from China for the period above stated.

October 4, 1879, the Secretary of State, in answer to an inquiry of the Fifth Auditor, said:

"The absence of Mr. Seward from his post from the 7th of June, 1878, the date of his departure from Peking, to his return to that place on June 19, 1879—one year and twelve days—presents a distinct and important question. This Department having maturely considered this question, has decided that Mr. Seward's absence from his post during the period just named, was not such an absence as the law contem-

*The testimony in relation to Mr. Seward is found in Mis. Doc. No. 31, 2d Sess. 45th Cong.

The cable despatches of May 1 and 8 are as follow:

"Telegram.

"DEPARTMENT OF STATE,

"Washington, May 1, 1878.

"STAHSEL, *Vice-Consul General, Shanghai:*

"Inform Seward that sub-committee, on motion of his counsel, consent to reasonable time for his appearance here. Leave granted; and he is required to bring all books, vouchers, and papers relating to the business of consul-general at Shanghai during his incumbency of that office, including any that may have been taken to Peking. Telegraph answer.

"EVARTS."

Sent May 2.

"Telegram.

"DEPARTMENT OF STATE,

"Washington, May 8, 1878.

"STAHSEL, *Consul-General, Shanghai:*

"Send messenger at once after Seward, with telegrams, and inform him he must start by first opportunity. Let books follow him, if necessary. Answer.

"EVARTS,

"Secretary."

plated when it limited the allowance of compensation of a minister, when away from his post, to sixty days of the annual salary. Mr. Seward did not, as is usually the case, withdraw from Peking for his recreation, or to attend to ordinary private business. He had been formally charged before the proper authority of his own Government with high misdemeanors, while holding the commission of consul-general at Shanghai. The authority which entertained the charge admitted that his appearance here was necessary to meet it."

Hon. Samuel Shellabarger for Mr. Seward:

An officer is *not* "absent from his post or from duty" when he is in discharge of the duties of his post, under the lawful commands of his superior officer, at any place where such superior has power in law to command him to go. (*U. S. vs. Williams*, 23 Wall., 411; *U. S. vs. Lip-pitt*, 10 Otto, 663.) Where two statutes exist *in pari materia*, one cutting off pay for "absence on leave or otherwise," and another allowing a superior officer to command such absence for the purposes of a great public duty relating to that *very post*, then such absence does not come under the head of "absence on leave or otherwise."

The Revised Statutes, sections 202 and 1752, authorize the President to control the movements of ministers, and the practice of the State Department is never to regard an absence by order as "an absence on leave or otherwise."* What the statute meant to render unlawful, was

*Instances of this practice are given in the following paper from the diplomatic bureau of the State Department:

DIPLOMATIC BUREAU, February 17, 1880.

Special services of United States ministers abroad, under orders or with approval of the Department, and entailing absence from their posts.

In the early history of the diplomacy of the United States, it was common usage to detach ministers on special service, away from their legations, to negotiate treaties with countries where the United States had no representative, and the like. Many of the earlier treaties with the African and Oriental States were so concluded.

A prominent historical instance is found in the celebrated Ostend conference, when Mr. Soule was sent from Madrid to Ostend to confer with Mr. Buchanan, of London, and Mr. Mason, of Paris, on the state of Cuba.

Coming down later, Mr. Low, the minister at Peking, was sent to Corea, to endeavor to negotiate a treaty, under the protection of a naval vessel.

On the 29th of August, 1879, Mr. Noyes was instructed to visit northern Africa and the Mediterranean coast, to report on the commercial openings there for American trade. (See *F. R.*, 1879, p. 342.) He did so, and was absent some four months, during which time he was regarded as on duty.

On the 30th of July, 1879, Mr. Kasson, minister at Vienna, was ordered to visit Rumania and Servia, to negotiate for the opening of diplomatic and commercial relations with those countries. (See *F. R.*, 1879, p. 79.) He did so, and was allowed expenses, in addition to his salary for the time so on duty.

On the 30th of October, 1880, Mr. Putnam, minister at Brussels, was instructed to proceed to Paris, to take part as the delegate of the United States in an international property conference. He did so, and was allowed expenses for the trip, besides being regarded as continuously on duty.

The instances of ministers being ordered to leave their posts on account of business properly pertaining to the countries in their charge are numerous. I mention the following:

On the 17th of March, 1880, Mr. Maynard, minister at Constantinople, was ordered to proceed to Cairo, there to try Sephen P. Mirzan, an American, accused of homicide. His personal expenses were allowed.

On the 13th of December, 1879, Mr. Maynard was authorized to visit Syria, and report on the condition of the country and the consulates. He did so, and was regarded as on duty during the whole time of his absence.

On the 15th of August, 1879, Mr. Foster, minister at Mexico, was ordered to visit the Rio Grande country, and report on the condition of the consulates.

compensation for more than sixty days in any one year, when the officer was *off duty*. "Otherwise" means other like cause—*ejusdem generis*. (Sedgwick, Stats., 360n.)

The *mischief* intended to be remedied by the statute was absence not devoted to the duties of the post, in excess of sixty days.

Hon. R. T. Merrick for Mr. Seward:

1. No law of the United States prescribes the duties of diplomatic officers. The designation of duties is intrusted to the President, subject only to the Constitution and law. (Rev. Stats., 1743, 1752.)
2. The order to Mr. Seward was peremptory. The service it called on him to perform had relation to his official duty as minister.
3. The post of duty, under sec. 1742, is that place where the order of the superior officer requires him to be. This is shown by reference to sec. 1741, "*absent from his post, or the performance of his duties.*" A minister "on leave" is "absent from his post," though he may remain at the capital to which he is accredited.
4. The Department of State certifies in substance that, as *matter of fact*, Seward was not absent from his post of duty. *This fact* is exclusively within the province of that Department.

The Revised Statutes contain these provisions:

"SEC. 1740. No * * * envoy extraordinary, minister plenipotentiary, minister resident, * * * or consul-general, * * * shall be entitled to compensation for his services, except from the time when he reaches his post and enters upon his official duties, to the time when he ceases to hold such office, and for such time as is actually and necessarily occupied in receiving his instructions, not to exceed thirty days, and in making the direct transit between the place of his residence, when appointed, and his post of duty, at the commencement and termination of the period of his official service, for which he shall in all cases be allowed and paid, except as hereinafter mentioned. * * * And no person shall be deemed to hold any such office after his successor is appointed and actually enters upon the duties of his office at his post of duty, nor after his official residence at such post has terminated, if not relieved. * * *

"SEC. 1741. No * * * minister * * * shall be absent from his post, or the performance of his duties, for a longer period than ten days at any one time, without the permission previously obtained of the President.

"SEC. 1742. No diplomatic or consular officer shall receive salary for the time during which he may be absent from his post, by leave or

The frequent journeyings of Mr. Osborn, Mr. Christiancy, and General Adams, during 1880, on business connected with the efforts of the United States to end the South American war, took them out of the jurisdiction of their respective countries for the time being. Their salaries and official services have, however, been regarded as continuous.

The repeated journeys of the minister at Guatemala, in visiting the other Central American States to which he is accredited, are hardly cases in point, except so far as allowance of expenses and continuous salary are concerned.

It would be easy to select many more instances, but the foregoing will possibly suffice to show the usage of the Department in such cases.

Respectfully submitted:

ALVEY A. ADEE,
Chief of Bureau.

otherwise, beyond the term of sixty days in any one year; but the time equal to that usually occupied in going to and from the United States, in case of return, on leave of such diplomatic or consular officer to the United States, may be allowed in addition to such sixty days.

"SEC. 1743. The compensation allowed by law to the various diplomatic and consular officers shall be in full for all the services rendered and personal expenses incurred by the persons respectively for whom such compensation is provided, of whatever kind such services or personal expenses may be, or by whatever treaty, law, or instructions they are required; and no allowance, other than such as is so provided, shall be made in any case for the outfit or return home of any such officer or person."

"SEC. 1752. The President is authorized to prescribe such regulations, and make and issue such orders and instructions, not inconsistent with the Constitution or any law of the United States, in relation to the duties of all diplomatic and consular officers, the transaction of their business, the rendering of accounts and returns, the payment of compensation, the safe-keeping of the archives and public property in the hands of all such officers, the communication of information, and the procurement and transmission of the products of the arts, sciences, manufactures, agriculture, and commerce, from time to time, as he may think conducive to the public interest. It shall be the duty of all such officers to conform to such regulations, orders, and instructions."

"SEC. 202. The Secretary of State shall perform such duties as shall, from time to time, be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign States or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department, and he shall conduct the business of the Department in such manner as the President shall direct."

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

Is Mr. Seward, on the facts stated, entitled to his salary as envoy extraordinary and minister plenipotentiary to China during the period of his absence from that country by direction of the President?

The Constitution authorizes the President, by and with the advice and consent of the Senate, to appoint ambassadors and other public ministers. (Art. II, sec. 2.)

The act of the Secretary of State is, in effect, the act of the President. (7 Op. Att.-Gen., 453; *Wilcox vs. Jackson*, 13 Pet., 498; *U. S. vs. Eliason*, 16 Pet., 291; *U. S. vs. Cutter*, 2 Curt., 617; *Williams vs. U. S.*, 1 How., 290; s. c., 5 Cr. C. C., 619; *Lockington vs. Smith*, Pet. C. C., 466.)

The law of nations defines the duties of our public ministers.

These duties may, to a certain extent, be prescribed or regulated by Congress or by treaty; but Congress has only to a limited extent done so, and the duties generally remain as prescribed by the law of nations.

The Constitution recognizes the law of nations as a part of the law of the land. (Art. I, sec. 7, cl. 10; 1 Op. Att.-Gen., 27; 11 Op., 299.)

It is the duty of the President to "take care that the laws be faithfully executed." (Const., art. II, sec. 3.)

The salary or compensation of our ministers is wholly dependent on the legislation of Congress. A treaty cannot fix a salary, because money can only be paid in pursuance of appropriations by law.

The statute provides, that "no * * * minister plenipotentiary * * * shall be *absent from his post, or the performance of his duties*, for a longer period than ten days at any one time, without the permission previously obtained of the President;" and that "no diplomatic * * * officer shall receive salary for the time during which he may be *absent from his post, by leave or otherwise*, beyond the term of sixty days in any one year."

Mr. Seward was absent from *China* "beyond the term of sixty days;" and, if *China* was his *post*, he is not entitled to the salary of his office for the period of such absence.

The right to the salary turns on the question: Where was his *post* during such absence?

It is certain that the post of an envoy extraordinary and minister plenipotentiary is,—*wherever he is required to be, by the President, for a purpose connected with the position or duty of such envoy.*

1. This is the rule of reason, founded on convenience. No act of Congress declares where the post of duty is. Generally the *post of duty* of an envoy to a foreign country is in that country; but many cases may arise when his service elsewhere might become necessary and proper.

If an envoy extraordinary should be sent to *China* with instructions to negotiate with that nation for a single or bi-metallic standard of money, with a view to similar treaty stipulations with other nations, and *China* should send an envoy to meet in the negotiation the envoys of other nations at *Paris*, our interest might require our envoy to find his post of duty there. Such conferences have been held. (Lawrence's *Wheaton*, 149, 672; Lawrence on Visitation and Search, Appendix, 205; Cong. Doc., 33d Cong., 2d Sess., H. R. No. 93.)

The statute allows an envoy no more than thirty days in which to receive his instructions. (Rev. Stats., 1740.) Were it not for this restriction, the President might, for that purpose, make *Washington* the envoy's post of duty for a longer period; but if the President should, for *other purposes* than the receipt of instructions, order him to remain in or return to *Washington*, this would, by reasonable implication, make *Washington* for such purposes his post of duty.

It might happen that the most valuable service our envoy to China could render to our Government would be to be absent from China, engaged in "masterly inactivity." No service might be the most efficient service, and absence the most available position for usefulness. Non-action may sometimes be the most valuable form of diplomatic action.

The existence of a state of war in a foreign country might necessitate a transfer of the post of duty elsewhere.

It might happen that our envoy could conduct negotiations with the minister of China near this Government in Washington to better advantage than in Peking.

Any law which would attempt to fix the *locality* of a *post of duty* would embarrass the Government and cripple the efficiency of the diplomatic service.

Salus populi suprema lex.

If the President could temporarily recall an envoy from a distant country only on condition of the loss of salary, it would impose a restraint on him and on the envoy detrimental to the public service. Authorized and necessary absence, and the period of its duration, should, on grounds of public policy, not be subjected to any such condition or restraint.

"A foreign minister is considered as in the place of the sovereign he represents, and therefore not, in point of law, within the jurisdiction of the sovereign at whose court he resides." (*Schooner vs. McFadden*, 7 Cr., 138.)

It is, doubtless, because of these, or similar, considerations, and for other reasons, that there is, by the law of nations, "an implied agreement among nations that the ambassador, while he resides in the foreign State, shall be considered as a member of his own country, and the Government he represents *has exclusive cognizance of his conduct and control of his person.*"

This right of control is carried to such an extent that the ambassador is exempt "from all responsibility to the laws" of the country to which he is accredited. (Bouv. Dic., title "Ambassador;" Grotius, b. 2, ch. 18, secs. 1-6.)

By the law of nations, then, the post of duty of an envoy extraordinary is that place where he is required to be by his sovereign. The post of duty of a *minister resident* or other lesser diplomatic officer, or *consul*, is not now under consideration.

2. Congress has by statute declared the existence of authority in the President to fix the post of duty of an envoy. The President "is authorized to * * * issue such orders * * * not inconsistent

with the Constitution or any law of the United States, in relation to the *duties of all diplomatic * * * officers*, [and] the transaction of their business * * * as he may think *conducive to the public interest*." (Rev. Stats., 1752.)

Section 1741 evidently treats the *post* of duty as the place where duties are to be performed; and there is no fixed location of the post beyond the control of the President.

This makes no new law. It is declaratory of the general principle in the law of agency that the agent is subject to the direction of the principal, and that the agent intrusted with the performance of a duty may adopt such modes as may be reasonably proper to execute it. (2 Phillimore, 227, ch. X; Brynkershoek, Q. I. P. C., 1, ch. XXIV; Lawrence's Wheaton, 383, part 3, ch. 1.) The envoy is but the agent of the President, who may, if he choose, in person, negotiate a treaty; but the usage is to act only through a minister. (Lawrence's Wheaton, 384, n. 120; Jefferson to Genet, August 19, 1793; President's Message, 1849-'50, pt. 1, p. 71; 6 Webster's Works, 492.)

The absolute right of a sovereign to control the movements and acts of his ambassadors and ministers is recognized by the law of nations; and in this respect the President is equal in power with the sovereign of any nation, subject only to the provisions of the Constitution.

The statute is clearly reconcilable with the opinion herein expressed. The statute denies the right to salary to an envoy when "absent from his post, by leave or otherwise."

This means absence by leave of the President, or absence without such leave.

Absence by leave *from his post* is one kind of absence; absence from it without leave includes all other forms of absence. If an envoy, by his own neglect, fails to reach his post of duty, or, without authority of the President, flees from it in the face of danger, he is absent without leave.

This provision of law as to salary was made necessary in order to insure the presence of a minister at the post of duty, so important always, and especially in the perils of war, when the protection of our citizens abroad may be an imperative duty.

It is necessary, also, because an officer is generally entitled to his salary while permitted to hold an office, whether he fully performs its duties or not, and although he may indulge in unnecessary absences. (Ware *vs.* U. S., 7 Ct. Cls., 556; Evans's case, *ante*, 1.) This rule is recognized in sections 40 and 41 of the Revised Statutes, even in respect of members of Congress.

The loss of salary results from "absence." Absence, as already stated, is of two kinds: *with leave*—*without leave*. The *purpose* of absence with leave is to *release* the officer *from official duty*—release him for the time being from the control of the President. Absence is not determined by the *place* where the minister is, but by his release from *duty and from Presidential control*. A minister may continue at *the place* where he generally transacts his official duties, and yet, in the legal sense, "be absent from his post by leave." So there may be an absence *ejusdem generis* without leave; that is, a refusal to perform duty and neglect of the President's orders. If a minister should, without authority, depart from the place at which he is assigned to duty, for the purpose of giving attention to his private business, or in pursuit of pleasure, this would be evidence of absence without leave. But at the place of his duty he might wholly occupy his time for the same *purposes*, and totally disregard all orders of the President, and so be "absent from his post * * * *otherwise*" than with leave.

The rule which interprets the word "otherwise" by reference to the words "absence * * * by leave," is one to be carefully observed.

Absence "by leave" occurs where, by authority of the President, a diplomatic officer is excused from the performance of duty. Absence "otherwise" is undoubtedly to be understood by reference to "absence by leave;" and in one sense the absence otherwise is *ejusdem generis*. The character of the absence "*otherwise*" is determined by its purpose and disobedience of Presidential orders. (*Williams vs. Golding*, Law R., 1 C. P., 69; *White vs. Ivey*, 34 Ga., 185; *State vs. McGarry*, 21 Wis., 496; *McIntyre vs. Ingraham*, 35 Miss., 25; *St. Louis vs. Laughlin*, 49 Mo., 559; *State vs. Pemberton*, 30 Mo., 376; *Gould vs. Sub-District*, 7 Minn., 203; *Queen vs. Edmundson*, 2 E. & E., 75.)

The maxim *nescitur a sociis* leads to the same result.

But it must not be understood that when the President *orders* an envoy to *do nothing*, or to go to a point distant from the seat of the Government to which he is accredited, because such *non-action* or *removal* of the post of duty will be useful to the public, the envoy is thus "off duty" or *absent from his post*. In such case he is on duty and at his post. He is on duty at the post where he is sent by authority.

Upon the principles thus stated, Mr. Seward was not "absent from his post" during any part of the time from June 7, 1878, to April 20, 1879. This is the period covered by his departure from China until he started from the United States to return. During this time he is entitled to full salary, and he does not, for any part of the time, need the aid of the provision for sixty days' absence; for throughout the entire period he was at his post.

3. Undoubtedly, *one* object of the order to return to the United States was to give an opportunity to testify and cross-examine witnesses in relation to the investigation of the office of consul-general formerly held by Mr. Seward. *This* object, possibly, had *no* purpose connected with his *duty* as envoy.

The Secretary of State, acting for the President, cannot lawfully give an envoy leave of absence, with a right to salary, for more than sixty days in one year, solely to attend to private interests, when these have no connection with his duty, and in no way affect him as envoy.

The right to fix the post of duty of an envoy is one to be exercised with a view to control the officer in his official acts, or in non-action with a view to official usefulness, or to ascertain his fitness for his position.

If the Secretary of State had distinctly declared that Mr. Seward was ordered to return to the United States *solely* to attend to his own private interests in the investigation of his acts as former consul-general, a different question would arise as to his right to salary as envoy. There is no authority to make such order.

But the accounting officers of the Government *cannot*, (1) on the evidence, find that Mr. Seward's absence was for this sole purpose; nor (2) is it within their province to make such inquiry.

When the President ordered him to Washington it must be presumed that the order was for a legitimate purpose. It is always presumed that the President, like any other officer, does his duty.

It was eminently proper that the President should ascertain if the envoy was a fit person to represent the Government. The latter's usefulness in China might be impaired by the pending charges, and his absence from China might be more useful to the Government than his presence there.

This was a case in which, in the interest of the public, the President might act on the maxim, *absentia ejusqui reipublicæ causa abest, neque ei neque alii damnosa esse debet*.

Mr. Seward was, therefore, during his said absence from China, lawfully assigned to a post of duty in the United States.

When the President *orders* an envoy to a post of duty, accounting officers will not inquire into the legality or purpose of the order, but will assume it to have been for an official purpose.

The President has authority "to issue orders in relation to the duties of all diplomatic officers."

It is a *duty* of such officer, when required, to give all information which may affect his fitness or efficiency for his position.

The President has no power to *order* an envoy for any but an official purpose. He may *give permission* to an envoy to leave his post for sixty days in the year with pay, or for a longer period without pay. But a permission or leave implies consent of both the President and the officer; an order is prescribed by a superior, and the inferior is bound to obey it.

To permit an accounting officer to inquire into the legality or purpose of such order, is to subject the President to the scrutiny of his departmental subordinates; which would be utterly inconsistent with his independence, and subversive of public interests.

The management of our foreign affairs, in peace and in war, may frequently require absolute secrecy—publicity may defeat the whole purpose of negotiation.

The authority of the President, when exercised, is conclusive on accounting officers; just as their authority, when exercised, is conclusive on him. The finality is reciprocal. When, as in the case of Mr. Seward, the law gives the President power to judge and act, no accounting officer can call in question the purpose or propriety of his orders, official in form. If on their face they appear to be for some unofficial purpose, the case would be different. (*U. S. vs. Jones*, 18 How., 96; *Bender's case*, 1 Lawrence, Compt. Dec., 344, and cases cited; *Eveleth's case*, *ante*, 20; *Allen vs. Blunt*, 3 Story, 742; *P. and T. R. R. Co. vs. Stimpson*, 14 Pet., 448.)

The authority of the President over an envoy is to be controlled by *political* considerations, with which neither courts nor other officers can interfere. (*Safford's case*, 1 Lawrence, Compt. Dec., 280; *Georgia vs. Stanton*, 6 Wall., 50; *Grossmeyer vs. U. S.*, 4 N. & H., 1; *The Protector*, 12 Wall., 700; *Van Antwerp vs. Hulburd*, 7 Bl. C. C., 426.)

Thus far this case has been considered wholly without reference to any inquiry before the committee in relation to the official conduct of Mr. Seward as *envoy*. (See House Rep. No. 143, 3d Sess. 45th Cong., p. 3.)

The action of the House of Representatives, and of the committee which made the investigation, is not material in this case.

Mr. Seward did not *leave* China by order of either.

The power of the House over *private citizens*, within the United States, is very great. (*Draft case*, 1 Lawrence, Compt. Dec., 15; Cong. Rec., vol. 3, pt. 1, 473, 512; *Id.*, vol. 4, pt. 3, 2490. But see *Kilbourn vs. Thompson*, Sup. Ct. U. S., March, 1881.)

How far, if at all, the House, or the subpoena of a court, can control the movements of an envoy, it may not be material to consider. The

practice of courts in obtaining the attendance of representatives in Congress as witnesses is well understood. (Draft case, 1 Lawrence, Compt. Dec., 14; 1 Burr's Trial, 177; U. S. *vs.* Kendall, 5 Cranch, 199, 203.)

If, with the mere *permission* of the President, Mr. Seward had left China *solely* to appear as a witness before the committee; or, without such permission, in obedience to a request of the committee; or if, being in the United States by order of the President, he had remained after a revocation of such order, he would have been absent from his post, and so not entitled to salary. But he was not so absent.

The salary of Mr. Seward as 'envoy from June 7, 1878, to June 19, 1879, should be included in his favor in the balance to be certified in adjusting his accounts.

TREASURY DEPARTMENT,

First Comptroller's Office, February 28, 1881.

**IN THE MATTER OF THE RIGHT OF THE SUCCESSFUL
CONTESTANTS FOR SEATS IN THE HOUSE OF REPRESENTATIVES TO COMMUTATION FOR STATIONERY AND
NEWSPAPERS FOR SESSIONS PRIOR TO THOSE IN WHICH
THEY WERE SEATED.—COMMUTATION CASE.**

1. A successful contestant for a seat in the House of Representatives, whose contest is only decided in the last session of a Congress, is entitled to the full commutation for newspapers and stationery for that session, but not for any previous session.
2. The contestee, who is a sitting member during a portion of such last session, is also entitled to stationery or commutation for the entire session.
3. The right to such stationery or commutation is one to be decided by the accounting officers of the Treasury Department.

During the Forty-sixth Congress there have been sundry cases of contested seats in the House of Representatives, some of them only recently decided during the present or third session.

The Hon. George M. Adams, clerk and disbursing officer of the contingent fund of the House of Representatives, has this day asked the decision of the First Comptroller on the question whether a recently successful contestant for a seat in the House is entitled to commutation for newspapers and stationery after the sitting member or contestee has received payment of commutation for each session of the present Congress; and if so, to how much, and whether for more than one session.

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

The act of February 12, 1868, (15 Stats., 35; Rev. Stats., sec. 43,) provides—

“That no * * * representative shall receive any newspaper except the Congressional Globe, or stationery, or commutation therefor, exceeding one hundred and twenty-five dollars *for any one session of Congress.*”

The words quoted were a proviso in the first section of the act. This proviso was repealed by the operation of sections 43 and 5596 of the Revised Statutes; but the allowances therein mentioned were subsequently authorized by the act of January 20, 1874. (18 Stats., 4.)

A contestant who is seated during this session cannot be allowed commutation for any previous session, because he has not been a member at that session. He is entitled to the commutation for this session because he is a member at this session. The contestee, who was also a member at this session, is entitled to the full commutation, because he was a member at this session. The law neither makes nor knows any fraction for commutation. When a sitting member loses his seat, the length of the session may not be known. The commutation is the same for a short as for a long session. Time is not an element in fixing the right to it.

It is well settled that a contestant who is seated becomes entitled to the full salary provided by law for the whole Congress, (Rev. Stats., 38;) but he does not become entitled to commutation for any session unless he be a sitting member at such session. The law gives a member newspapers and stationery mainly for use for public purposes, or a commutation in money which is supposed to be devoted to such purposes.

The *reason* on which the provision is founded applies only to one who is actually a member, not to one who is a claimant.

If the *claim* to a seat gave the right to commutation, then a defeated contestant would, *quoad hoc*, have the benefit of the seat as well as a successful contestant. A right to commutation has never been recognized in a defeated contestant.

The question of the right to commutation is one on which the accounting officers of the Treasury Department are required to pass. (Rev. Stats., 46, 191, 236, 248, 269.)

The certificate of the Speaker of the House as to salary and traveling expenses of members is “conclusive upon all * * * officers.” (Rev. Stats., 48.)

The contestants who have been seated during the present session will be entitled to full commutation for this session.

TREASURY DEPARTMENT,

First Comptroller's Office, March 2, 1881.

H. Ex. Doc. 219—5

**IN THE MATTER OF THE AMOUNT OF COMPENSATION DUE
TO CLERKS OF SENATE COMMITTEES FOR SERVICE
"DURING THE SESSION" ENDING MARCH 4, 1881, OR
ANY PART THEREOF.—SENATE-CLERKS' CASE.**

The legislative, executive, and judicial appropriation act of June 15, 1880, (21 Stats., 210, 212, 215,) appropriated \$15,840 to pay twenty-two clerks of Senate committees compensation at \$6 per day "during the session" from December 6, 1880, to March 4, 1881, and declared that said words "during the session" shall mean four months: *Held*, that—

1. The clerks who served eighty-eight days, from December 6 to March 4, are entitled to be paid \$6 per diem for four months, or one hundred and twenty days; in all, \$720.
2. When one clerk has served a portion of the period from December 6 to March 4, and another clerk the residue of such period, each should be paid such proportion of \$720 as the period of his service bears to eighty-eight days.
3. The clerks of committees during such session cannot, by reason of their position as such, be paid for services during an executive session, commencing on the 4th of March, called by the President.

On the 23d February, 1881, Hon. John C. Burch, Secretary of the Senate of the United States, addressed to the First Comptroller the following letter:

"I respectfully call your attention to certain expressions in the 'act making appropriations for the legislative, executive, and judicial expenses of the Government for the year ending June 30, 1881.' (See Statutes U. S., 1880, pamphlet edition, pp. 210-215.)

"In the first paragraph, on page 212, you will see that the compensation is provided for 'twelve laborers *during the session*, at the rate of \$720 each per annum.' In paragraph 3, of the same page, 'for twenty-two clerks to committees, at \$6 per day *during the session*,' &c. In paragraph 4, 'for fourteen pages for the Senate Chamber, three riding pages, at the rate of \$2.50 per day each while actually employed,' &c. In paragraph 3, of page 215, of the same act, the following language occurs: 'Wherever the words *during the session* occur in the foregoing, they shall be construed to mean *four months*.'

"The present session of Congress began on the 6th of December last; when it adjourns on the 4th of March next, shall I pay the clerks, pages, and laborers, who have served during the session for four months? If there have been changes in any of the positions by resignation, removals, or otherwise, shall I pay those who may be in service at the adjournment of the session for such portion of four months as has not been paid to their predecessors?

"I also respectfully call your attention to the following: No provision has been made for compensation for any services during the called session of the Senate after the 4th of March. In order to properly provide for such compensation in the 'deficiency bill' now pending in the House, it will be necessary to have in anticipation your ruling upon this: to what pay will the clerks, pages, and laborers aforementioned, who may be employed during that session, be entitled?"

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

The Secretary of the Senate is the disbursing officer of that body, and makes payments to laborers and clerks of Senate committees. (Rev. Stats., 52, 56, 60.) His accounts are examined and settled by, respectively, the First Auditor and First Comptroller.

The questions propounded are therefore properly submitted for the decision of this office.

The act of June 15, 1880, (21 Stats., 210, 212, 215,) made appropriations for the fiscal year ending June 30, 1881, as follows:

“For eight skilled laborers, at one thousand dollars each per annum
 * * * twelve laborers, during the session, [of the Senate,] at the rate of seven hundred and twenty dollars each per annum * * *.”

“For twenty-two clerks to committees, at six dollars per day during the session, [of the Senate] * * *.”

The act specifies the sums appropriated. It then provides that—

“Wherever the words ‘during the session’ occur in the foregoing, they shall be construed to mean four months.”

If the statute should be construed *literally*, it would seem to imply that there shall be four months’ service in the cases mentioned. But *qui hæret in litera hæret in cortice*.

Congress evidently did not intend to require four months’ service; because the session extended only from December 6, 1880, to March 4, 1881, and, under the law, could not be of greater duration. (Const., art. I, secs. 2, 4, cl. 1, 2; Rev. Stats., secs. 20, 25; paragraph 3 of note to page 17, Rev. Stats., 2d ed., Constitution.)

The purpose was to pay the clerks and laborers entitled to a *per diem* compensation such compensation for or during the session, counting it as four months, or one hundred and twenty days.

The Senate committees will cease to exist on the 4th of March. This is the effect of the expiration of the Forty-sixth Congress on that day, or perhaps, more strictly, on the 3d of March. The terms of membership of one-third of the whole number of Senators will expire on that day. The committees are all to be reorganized, either at a session of the Senate in March—already called by the President—or at the regular session in December. (Const., art. II, sec. 3.)

Until such reorganization, there can be no committee of the Senate, no chairman of any committee, no clerk of any committee, and no committee to audit accounts, or chairman of committee to certify to services, of clerks. (Rev. Stats., 76.)

In view of the short period of the service of clerks of committees and laborers, from December 6 to March 4, Congress intended to pay them beyond the time actually employed.

The Secretary of the Senate asks how payment shall be made in case changes have occurred in laborers or clerks, by resignation, removal, or otherwise.

The proper mode will be to pay each clerk and laborer who renders service such proportion of the entire compensation, computing *per diem* for one hundred and twenty days, as the period of his service bears to the eighty-eight (88) days of the session. If a committee has had a clerk for the first half of the session and another clerk for the last half, each should be paid an equal sum. If a clerk has served one-third of the period of the session, he should have compensation for one-third of one hundred and twenty days. These rules will give to each laborer and clerk the benefit of the provision made in the nature of extra compensation, by counting a session of eighty-eight days as one hundred and twenty days.

The Secretary of the Senate states that no provision has been made for any service during the called session which will take place on and after the 4th of March; and that in order to provide properly for such compensation in the deficiency bill now pending in the House, it will be necessary to have, in anticipation, the ruling of the First Comptroller upon this point, namely: To what pay will the clerks, pages, and laborers before mentioned, employed during that session, be entitled?

The clerks, pages, and laborers who may be employed at the called session of the Senate will be entitled to such pay as may be provided by Congress. The appropriation act of June 15, 1880, only made provision for the *regular session*, from December 6 to March 4.

No provision is made for a special or called session. *This* act did not fix any rate of compensation for clerks, &c., for any but the one regular session.

If Congress shall deem it proper to provide compensation for clerks, &c., for a called session, they will have the benefit of such provision. None is provided by the act of June 15, 1880. The clerks during the regular session will not be required to perform service at a called session unless upon a new appointment.

TREASURY DEPARTMENT,

First Comptroller's Office, March 2, 1881.

IN THE MATTER OF CHARGING THE UNITED STATES WITH THE EXPENSE OF DECORATING THE SAN FRANCISCO MINT ON THE OCCASION OF A PRESIDENTIAL VISIT.— DECORATION CASE.

1. No part of the "contingent fund" appropriated for the San Francisco Mint by act of June 15, 1880, (21 Stats., 224,) can be used in paying for *decorations* placed on the Mint building in honor of the visit of the President of the United States and other distinguished officers and citizens, in September, 1880.
2. The Revised Statutes show a legislative intent carefully to guard and restrict the use of money appropriated for contingent expenses. (Secs. 193, 3680-3683.)
3. Section 3683 of the Revised Statutes limits the use of the contingent funds for the purchase of articles to such only as the head of the proper Department "shall deem necessary and proper to carry on the business of the Department."
4. The terms generally employed in making appropriations for contingent expenses, and the connection they bear to definite appropriations for specific purposes, limit the use of contingent funds to the purpose of carrying on the business of the Department or bureau for which they are appropriated.
5. The purposes defined to which contingent funds may be applied.
6. The approval, under section 3683 of the Revised Statutes, by the head of a bureau of an expenditure from a contingent fund, is not conclusive on accounting officers.
7. There is no constitutional authority for Congress to make an appropriation having no reference to the public interest or welfare.

In the account of the superintendent of the Mint at San Francisco, Cal., rendered to the Treasury Department, September 30, 1880, a charge is made against the United States, in the item of contingent expenses, for "decorating the Mint for Presidential reception, \$250;" which sum was paid, September 17, 1880, to Gumpertz & Spamer. The superintendent, in a letter dated San Francisco, November 20, 1880, to the Director of the Mint, says that the Mint was decorated "on the occasion of the President's recent visit to this [that] city," and, in explanation of the voucher for the payment of the expenses, adds:

"To reach the high elevation of the centre and wings of the building, it was necessary to employ skilled workmen, with suitable stagings and appliances, to do the work. It could not be done by workmen in the building.

"A considerable amount of additional material was procured. Six large shields were furnished for the wings of the building and a large oil portrait of the President for the centre; the six high stone columns were beautifully draped, flowers and flower-baskets furnished, and the building presented a very creditable appearance. The bill in question embraced a considerable amount of labor in arranging and preparing the decorations, the furnishing of shields, portrait, flowers, and baskets, as well as the putting up and taking down of the same, at an elevation

of some ninety feet. A large amount of labor was also done by the employés in the Mint. The bill was rendered for \$325, but it was originally stipulated that it should not exceed \$250."

Hon. *Horatio C. Burchard*, Director of the Mint, submitted the following:

"On the 19th of September, 1879, authority was given the superintendent of the Mint at San Francisco to decorate that building upon the occasion of General Grant's arrival from his tour abroad, and the expense was paid from his contingent appropriation, audited by the First Auditor and allowed by the Comptroller.

"On the 6th of April, 1876, authority was given by my predecessor to the superintendent of the Mint at Philadelphia to decorate that building in view of the approaching Centennial celebration, which was done at an expense of \$188.70, paid for from his contingent fund, and the account was audited by the First Auditor and allowed by the Comptroller.

"The expenses of draping public buildings on occasions of mourning are paid from contingent appropriations." (See House Ex. Doc. No. 10, 1st Sess. 39th Cong., vol. 7, pp. 3, 9, 13, 27, Contingent Expenses Treas. Dept.; House Ex. Doc. No. 131, 1st Sess. 43d Cong., vol. 10, pp. 10, 13; House Ex. Doc. No. 70, vol. 12, 2d Sess. 43d Cong., p. 10.)

The papers are submitted to the First Comptroller, to decide whether this sum of \$250 can be paid out of the appropriation "for incidental and contingent expenses" of the Mint at San Francisco, (21 Stats., 224,) and allowed in the account of the superintendent.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

In September, 1880, the President of the United States, with high officers of the Government and other distinguished personages, visited San Francisco and many points on the Pacific coast.

The visitors were greeted with the highest evidences of public confidence and esteem; and grand decorations, made with a lavish expenditure characteristic of a wealthy and generous people, added to the attractions of the splendid receptions given to them in the cities and among the enterprising, intelligent, and hospitable population of that fertile and beautiful region.

It was eminently proper that the Mint should be, as it was, handsomely decorated in recognition of the presence of the illustrious tourists; thus making its external appearance correspond with the attractive beauty of the golden treasures within, and rendering honors to whom they were due.

A portion of these decorations, to the extent of \$250 in cost, was procured by direction of the superintendent of the Mint; and the question now to be determined is, whether the payment of this sum out of the public funds was authorized by law. It is certain that it *was not*.

The legislative, executive, and judicial appropriation act of June 15, 1880, (21 Stats., 210, 224,) makes these among other provisions:

"That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-one, for the objects hereinafter expressed, namely:

* * * * *

"Mint at San Francisco, California.—For salaries of superintendent, four thousand five hundred dollars; assayer, melter and refiner, and coiner, at three thousand dollars each; chief clerk, two thousand five hundred dollars; cashier, two thousand five hundred dollars; four clerks, at one thousand six hundred dollars each; in all, twenty-four thousand nine hundred dollars.

"For wages of workmen and adjusters, two hundred and sixty-five thousand dollars.

"For incidental and contingent expenses, eighty thousand dollars."

The subject of *contingent expenses* is one of great importance.

These expenses rest so much in official *discretion*, and are so *uncontrolled by law*, except in the aggregate amount, that they are to be scrutinized with great care and limited to those *objects* which are expressed in the act, or are clearly or by reasonable inference within the purpose of the law-making power.

The danger of abuses of *discretionary power* is well understood.* It has been said that "there is an inherent and eternal difficulty in confining power of any kind within its proper limits." (Sedgwick, Stat. and Const. L., 183, 2d ed.)

In Bacon's Aphorisms it is declared that "*optima est lex, quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi.*" (1 Cas., 80n; 1 Powell, Mortg., 247 a; 2 Belt, Sup. to Ves., 391; Toullier, liv. 3n, 338; 1 Lilly, Abr., 447.)

"The discretion of a judge is said to be the law of tyrants." (Bouv. Dic., "Discretion.")

Discretion in the hands of executive officers is liable to abuse, possibly even more than in the judicial department.

But, with all this, it is absolutely impossible to administer any department of Government without a large measure of discretion. It is a duty so to exercise discretionary powers as not to bring them into reproach.

Congress evidently intended to *guard carefully* the use of appropriations for incidental and contingent expenses, as may be seen from the following provisions of the Revised Statutes:

"SEC. 193. The head of each Department shall make an annual report to Congress, giving a detailed statement of the manner in which the contingent fund for his Department, and for the Bureaus and offices

therein, has been expended, giving the names of every person to whom any portion thereof has been paid; and if for anything furnished, the quantity and price; and if for any service rendered, the nature of such service, and the time employed, and the particular occasion or cause, in brief, that rendered such service necessary; and the amount of all former appropriations in each case on hand, either in the Treasury or in the hands of any disbursing officer or agent. And he shall require of the disbursing officers, acting under his direction and authority, the return of precise and analytical statements and receipts for all the moneys which may have been from time to time during the next preceding year expended by them, and shall communicate the results of such returns and the sums total, annually, to Congress."

"SEC. 3680. No part of the appropriations which may be at any time made for the contingent expenses of either House of Congress shall be applied as extra allowance to any clerk, messenger, or attendant of the two Houses, or either of them, or as payment or compensation to any clerk, messenger, or other attendant of the two Houses, or either of them, unless such clerk, messenger, or other attendant be so employed by a resolution of one of the Houses; or to any other than the ordinary expenditures of the Senate and House of Representatives.

"SEC. 3681. No accounting or disbursing officer of the Government shall allow or pay any account or charge whatever, growing out of, or in any way connected with, any commission or inquiry, except courts-martial or courts of inquiry in the military or naval service of the United States, until special appropriations shall have been made by law to pay such accounts and charges. This section, however, shall not extend to the contingent fund connected with the foreign intercourse of the Government, placed at the disposal of the President.

"SEC. 3682. No moneys appropriated for contingent, incidental, or miscellaneous purposes shall be expended or paid for official or clerical compensation.

"SEC. 3683. No part of the contingent fund appropriated to any Department, Bureau, or office, shall be applied to the purchase of any articles except such as the head of the Department shall deem *necessary and proper to carry on the business of the Department, Bureau, or office*, and shall, by *written order, direct to be procured.*"

See also secs. 130, 240.

Upon the plain language of section 3683, this expenditure was unauthorized, because it clearly was not "*necessary AND proper to carry on the business of the*" Mint.

It is the business of the Mint and its officers to coin money and perform duties connected therewith. An "oil portrait" is not "necessary * * * to carry on the business of the" Mint. "Flowers and flower-baskets" were not "necessary * * * to carry on the business."

No one will venture to say that it was any part of the purpose of the establishment of the Mint to give a manifestation of gratitude, of hospitality, of honor, or of homage to distinguished persons, official or unofficial, by citizens or officers.

Judging of this expenditure by the letter, spirit, and purpose of written law, it is clearly unauthorized.

It is equally unauthorized by any definition which can be fairly affixed to the words or purposes of the appropriation act—"for incidental and contingent expenses."

What is incidental? It is derived from the prefix *in*, and *cadere*, to fall. In law, *incident* means "dependent upon or appertaining to another thing called the *principal*;" that is, as applicable to the subject now being considered, the *principal* is the Mint, or its *purpose to coin money* and perform other duties prescribed by law. All things which are to be regarded as incidental expenses of the Mint, must have some connection with that purpose.

Appropriations are made as far as practicable for specified, clearly-defined purposes of the Mint. They all have relation exclusively to such purposes.

So far as the objects of the several items of appropriation are defined, they are the *only* provisions made or authorized for these purposes.

But, as *appertaining* to the same general purpose of the specific items appropriated for defined purposes, there may arise an unforeseen and unforeseeable necessity for an expenditure essential to keep the Mint in operation or execute clearly-defined objects.

The purpose of a contingent fund is to provide for such necessary expenditure, in order to carry out the designs of the principal appropriation. It is an incident to the principal design. It must follow the principal appropriation in its purpose. *Accessorium non ducit, sed sequitur suum principale*. And what is meant by the word "*contingent*?" As used in the statute it is almost, if not quite, a synonym of the word *incidental*. If there be a shade of difference, "thin partitions do their bounds divide." It is derived from *con-tingo—contingere*—"to touch on all sides." In law, it imports being "dependent for effect on something that may or may not occur," but "touching on all sides" that on which it is "dependent for effect."

A contingent expense is one necessary to secure, and connected with, an object or result authorized by law. It is one incurred in aid of an object when the general means of accomplishing the object are authorized by specific appropriations, and thereby rendered possible of execution in the absence of unforeseen or undefinable necessities connected therewith. It provides for the unforeseen and also for undefinable necessities. It is not generally *an addition* to that which is specifically appropriated for a defined purpose; for *expressio unius est exclusio alterius*. Thus, when "four clerks" are provided for by an appropriation, a contingent fund cannot be used to pay for additional clerks, or for the same kind of services required of the four authorized.

(Clerk's case, 1 Lawrence, Compt. Dec., 305.) When a given sum is appropriated to purchase materials, a contingent fund cannot be used to purchase additional materials.

It is *possible* that a contingent fund may occasionally be used for a purpose for which a specific appropriation has been made; as when an unforeseen and unforeseeable contingency has rendered necessary the use of money in addition to that specifically appropriated. Such cases will probably be found rare in practice.

But if an unexpected contingency requires a transfer, at some expense, of the furniture and fixtures requisite to enable a clerk to perform his duties at a place to which he may be lawfully assigned, and no specific provision is made for such transfer, this is a proper charge on a contingent fund.

If materials are purchased, and there is an unexpected failure to deliver them, or, after delivery, unforeseen peril arises as to their custody and safe-keeping, the expenses of necessary agents, or other cost of securing them not otherwise provided for, are a proper charge on a contingent fund.

The Attorney-General has said that contingent expenses, as used in the appropriation acts, "mean such incidental casual expenses as are necessary or appropriate and convenient in order to the performance of duties required by law of the Department or the office for which the appropriation is made." (16 Op., 412.)

There would be great danger, and temptation to abuse, in giving a sanction to the expenditure under consideration. The reason or excuse, if there be any, for allowing it in the account of the superintendent, would, for example, apply with far greater force to the expenditure of the public treasure, on the occasion of inaugurating a President, for the decoration of the magnificent granite and marble public buildings of Washington. Through such laxity of interpretation, the cost of beautiful drapery, shields, oil portraits, flowers, and flower-baskets, "as well as the putting up and taking down of the same," would be defrayed out of some contingent fund appropriated for a wholly different purpose; and the admiring multitude of spectators, who properly turn out or come to do honor to the event, might not inaptly join in the choral refrain, "That's the way the money goes," under appropriations for "incidental and contingent expenses," with decorations "touching on all sides" the public *buildings*, but touching on no side the public *business*.

There would be much to encourage those in office, and desirous of remaining, to make a liberal construction and appropriation of contingent funds on such an occurrence; and devotion to a President would

be intensified by the recollection that, "Turned by his nod, the stream of honor flows."

If a contingent fund may be diverted from the general object of a definite appropriation, or one necessarily incident thereto, and be applied in aid of public demonstrations in honor of men, then, as its expenditure is controlled merely by discretion, why may not the result of a Presidential or Congressional election be the occasion of a draft on some contingent fund? Public demonstrations are proper as well in honor of great events as of distinguished men.

It is a patriotic duty to "celebrate with bonfires, festivals, and rejoicings," the anniversary of the natal day of the Nation; but it would be melancholy evidence of the decadence or extinction of public spirit if this could only be done by the aid of a Congressional appropriation, under cover of a contingent fund.

In the particular case of the decorations at San Francisco, public officers may well be permitted to share, at their own expense, in the tribute of respect to the Presidential party. A tribute so conferred would, perhaps, constitute a more graceful mark of honor, and insure itself a more grateful reception. A voluntary tribute

" * * * is twice blessed;
It blesseth him that gives and him that takes."

The public-spirited, generous people of California will never need the aid of a contingent fund to do honor either to great occasions or illustrious men. No sanction should be given to a use of public money which might detract from the full measure of respect due to their undoubted patriotism and liberality.

A refusal to sanction this expenditure from the public treasury cannot in any sense be construed as wanting in respect for any of the eminent party in whose honor the decorations were made.

No President can sanction the expenditure of public money for decorations in honor of himself, when no law has in terms or by fair inference so authorized. It is his duty to "take care that the laws be faithfully executed." The President who so recently retired from office has discharged this duty with a degree of fidelity which filled the whole measure of the Constitution, and rendered his administration illustrious for its ability, its care, its purity, and its exalted patriotism.

In addition to all this, there is a grave question of constitutional law involved in this expenditure.

The Constitution declares that "the Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States."

No narrow construction of the immense power given by these words to Congress over the public revenues should be adopted.

If Congress should make a law which in clear terms made an appropriation for decorations on such an occasion as that at San Francisco, the direct question of its constitutionality would present itself. It could scarcely be authorized under the authority to "provide for the common defence."

The "general-welfare" power is one which has been discussed in many volumes. As a separate, distinct, substantive power, unlimited save only by the discretion of Congress, it can, to that extent, have no existence. Its existence and extent are debatable.

Where the existence of a power is in a large measure denied, and is not claimed in an unlimited sense by any one, and only in a qualified sense by the current of opinion, a law should not, merely by inference and construction, be held as carrying the exercise of such power. This could only be when the words or purpose of the law clearly or by fair inference so require.

Whether a law authorizing the decoration of a public building at the public expense for an object having no connection with the public service, but merely as a mark of respect for high officials, can be justified under a general-welfare power, certainly admits of reasonable doubt at least; and in such case the doubt should be resolved against a construction to make an appropriation by inference for that object.

There were decorations in 1876 of public buildings for the purposes of the "Centennial International Exhibition." This exhibition was authorized or aided by the acts of March 3, 1871, (16 Stats., 470;) June 1, 1872, (17 Stats., 203;) June 5, 1874, (18 Stats., 53;) June 16, 1874, (18 Stats., 76;) March 3, 1875, (18 Stats., 375;) February 16, 1876, (19 Stats., 4;) April 17, 1876, (19 Stats., 34;) May 1, 1876, (19 Stats., 45;) March 3, 1877, (19 Stats., 370;) joint resolution June 20, 1879, (21 Stats., 50;) joint resolution June 27, 1879, (21 Stats., 53;) act June 6, 1880, (21 Stats., 281.) (*Eysler vs. Centennial Board*, 94 U. S., 500.)

Most of these were in force in 1876. They provided for an exposition of the industry of all nations. They were made "to * * * provide for the general welfare of the United States." They had the authority of the power "to regulate commerce with foreign nations." The whole legislation of Congress making such appropriations during that time had some reference to these conditions and purposes; and it was necessary and proper that the laws should be construed with reference to them.

Great national and international interests were involved and pro-

moted by making our public buildings attractive. The direct interests of our citizens were promoted by it.

What was then justified for great purposes like these can furnish no precedent for occasions of public demonstration in honor of high officials.

It is not intended to limit the use of contingent funds to purposes *absolutely necessary* to carry out the object of a direct appropriation. Such funds may be used, within proper bounds, to contribute to the convenience and comfort of the public service.

Those articles of convenience, and even of ornament, sanctioned by refined and enlightened usage, may, to a certain extent, be presumed to be within the purpose of appropriations.

In the purchase of articles necessary for the public use, the elements of utility and ornament may be combined; but perishable articles for ornament alone, with absolutely no utility for public service, are not within the purpose of a contingent fund.

The rejection of a voucher, as in this case, by no means implies censure of any officer. The superintendent of the Mint at San Francisco has been, and is, distinguished alike for ability, fidelity, and economy. The appropriation for contingent expenses of the Mint under his charge for 1879 was \$87,500; his expenditure, only \$75,864 63. The appropriation for 1880 was \$87,500; his expenditure, only \$46,525.75.

This is an example worthy of commendation and imitation, and compares very favorably with expenditures under prior appropriations.

It is a sufficient objection to this voucher that the expenditure covered by it does not appear to have been made by the "written order" of the head of the proper bureau.

The action of the superintendent may, however, be ratified, and thus rendered as valid as if originally authorized; and this may be considered as done, since the action in question has the sanction of the able and careful head of the proper bureau. But the latter's approval is not conclusive on the accounting officers, whose duty it is, by express law, to pass on the legal validity and amount of the expenditure. (Rev. Stats., 191, 236, 269, 277.)

The voucher for \$250 is disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, March 14, 1881.

IN THE MATTER OF THE EFFECT OF A RESOLUTION OF THE SENATE DIRECTING PAYMENT OF COMPENSATION TO CLERKS OF COMMITTEES FOR A PERIOD IN WHICH NO COMMITTEES WERE ORGANIZED.—SPECIAL-SESSION CASE.

1. The "deficiency" act of March 3, 1881, appropriating money to pay a *per diem* compensation to "clerks to committees [of the Senate] during the special session" of the Senate, commencing March 4, 1881, makes no appropriation to pay any compensation, *extra* or otherwise, for or by reason of services rendered by clerks at the *previous regular session* of the Senate.
2. The fact that some of those who were clerks during the regular session were reappointed in that capacity to committees as reorganized at the special session, March 18, does not aid them, nor enlarge the operation of the deficiency appropriation made by the act of March 3, 1881.
3. No payment of compensation to clerks can be made by virtue of a resolution of the Senate directing it, unless there be a law which authorizes payment.
4. In the absence of any restraining statute, the Senate is the exclusive judge of the purposes for and manner in which its contingent fund shall be applied. No executive officer can, in such case, call in question the propriety or validity of its application.
5. Under section 1765 of the Revised Statutes, a resolution of the Senate cannot authorize the payment *from a general appropriation* of extra compensation to clerks whose *per diem* pay is fixed by law.
6. But section 1765 is so far restrained by section 3680 that under the latter the Senate may, by resolution, authorize the payment from its *contingent fund* of extra compensation to clerks appointed by resolution, and *after* being so appointed.
7. Section 3682 of the Revised Statutes does not prohibit either House of Congress from applying its contingent fund in paying extra compensation to clerks.
8. The character of an appropriation is not necessarily determined by the head under which it is placed, nor by what it may be called in the act, but by its evident purpose. Hence—
9. An appropriation *specifically* for the payment of a designated number of clerks is, *eo nomine* and *technically*, no part of a "contingent fund" merely because so called, or placed under such head.
10. The appropriation act of June 15, 1880, makes no provision for the payment of clerks with a *per diem* compensation after the regular session which terminated on the 3d of March, 1881.
11. A valid resolution of the Senate directing its Secretary, who is also its disbursing officer, to pay money, without in terms stating the fund from which it is to be paid, will be construed as intended to apply to the contingent fund over which the Senate has control, when there is no other fund to which the direction could properly apply.
12. An appropriation act could authorize payment from any fund set apart by it for use under a resolution of either branch of Congress, whether called a contingent fund or otherwise.

13. Section 3680 of the Revised Statutes is *prospective* in its operation, applying only to clerks *after* their appointment by resolution.
14. The accounting officers of the Treasury Department, in settling the accounts of disbursing officers, cannot allow vouchers for unauthorized payments.
15. The "deficiency" act of March 3, 1881, appropriating money to pay certain clerks therein named, without fixing the rate of *per diem* compensation, is to be construed as supplemental to the act of June 15, 1880, and as adopting by inference the rate of compensation therein prescribed.

The Secretary of the Senate addressed a letter, as follows:

"OFFICE OF SECRETARY OF THE U. S. SENATE,
"Washington, March 21, 1881.

"SIR: In the general deficiency bill, approved March 3, 1881, a clause * * * appropriates money for the pay of *per diem* committee-clerks and the pages of the Senate during the special session. * * * You decided, under date of March 2, 1881, that the termination of the regular session put an end to committee organizations; and hence the *per diem* clerks, not being strictly employed, were not entitled to the benefits of the above-mentioned act. On the 18th of March, 1881, the Senate, desiring to meet the point thus raised by your office, passed the resolution which I enclose. * * * I would respectfully ask whether, in your opinion, it constitutes the clerks legally employed between the dates specified, and hence entitled to the compensation provided for in the appropriation bill?

"Very respectfully,

"JOHN C. BURCH,
"Secretary.

"HON. W. LAWRENCE,
"First Comptroller."

The resolution mentioned is as follows:

"IN THE SENATE OF THE UNITED STATES, March 18, 1881.

"Resolved, That the Secretary of the Senate be, and he is hereby, authorized and directed to pay the clerks of the committees of the Senate who held such positions on the fourth day of March, 1881, and who do not receive annual salaries, the usual *per diem* compensation from the fifth day of March to the eighteenth day of March, 1881, inclusive.

"Attest: JNO. C. BURCH, *Secretary.*"

The Senate committees were not organized at the special session until March 18, 1881.

The previous committee organizations ceased with the close of the Forty-sixth Congress on March 3, 1881.

The Senate now in session is that of the Forty-seventh Congress.

—

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The legislative, executive, and judicial appropriation act of June 15, 1880, (21 Stats., 210,) makes appropriations, among others, for the payment of clerks, laborers, &c., of the Senate, during the fiscal year from July 1, 1880, to June 30, 1881.

When the law was passed there was but one regular session of the Senate provided for—that from December 6, 1880, to March 3, 1881, inclusive.

The act, accordingly, in providing *per diem* compensation for clerks, uniformly uses the expression “*during the session*,” and declares that this “shall be construed to mean four months.”

This evidently refers to the *regular* session, and no other.

The inauguration of a new President on the 4th of March rendered a special session of the Senate proper, and it was accordingly called, February 28, 1881, by the President, to meet on the 4th of March following.

In anticipation of this, and in view of the exhaustion of the appropriation made by the act of June 15, 1880, for *per diem* compensation of clerks to Senate committees, an act of Congress was passed, approved March 3, 1881, (21 Stats., 414,) entitled—

“An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and eighty-one, and for prior years, and for those certified as due by the accounting officers of the Treasury in accordance with section four of the act of June fourteenth, eighteen hundred and seventy-eight, heretofore paid from permanent appropriations, and for other purposes.”

It declares in the enacting clause:

“That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter stated, namely: * * *

“SENATE.

“For twenty-two clerks to committees, and eighteen pages, a sum sufficient to pay them during the special session of the Senate.

“For salaries of officers, clerks, messengers, and others receiving an annual salary in the service of the Senate, a sum sufficient to pay the twelve laborers, during the special session of the Senate.”

The question presented is, whether, under *this* appropriation “for twenty-two clerks to committees” and the resolution of March 18, a *per diem* of \$6 for the period from March 5 to March 18, inclusive, can be paid to the “twenty-two clerks” who held such positions on the third (or, as the resolution says, fourth) day of March, 1881?

It is very certain that no payment is authorized by the resolution, either alone or in connection with the act of March 3, 1881, or that of June 15, 1880. These may be considered in the view that payment is claimed either (1) to give a gratuity or extra compensation to those who were clerks during the *regular session* on the 3d of March, but who were not afterwards reappointed; or (2) to give pay during the period from March 5 to March 18, whilst not legally in service, but actually

so, or awaiting reappointment, to those who were clerks on the 3d of March, during the regular session, and reappointed on the 18th of March.

In view of the explicit language of the several acts and of the resolution of the Senate, it is entirely immaterial that the act of June 15, 1880, by providing compensation for one hundred and twenty days for a session and service of eighty-eight days, gave pay for this period to most if not all of the clerks; nor is it material that the "sundry civil" appropriation act of March 3, 1881, (21 Stats., 435, 456,) makes the following provision :

"To enable the Secretary of the Senate and the Clerk of the House of Representatives to pay to all committee clerks, pages, and other employes of the Senate and House of Representatives, respectively, and who shall be so employed at the adjournment of this Congress, who do not now receive annual salaries, a sum equal to thirty days' pay at their present rate of compensation, as extra pay; and an amount sufficient to pay the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, and shall be immediately available."

Can the clerks of the regular session in service March 3, but *not reappointed*, be paid as proposed ?

I.—As to the effect of the act of March 3, 1881 :

1. The clerks cannot be paid under the act of March 3, 1881, because it appropriates money *only* "for * * * clerks to committees * * * during the special session." It requires two conditions precedent to a right to compensation: *First*, that the claimant be a clerk to a committee; *second*, that he be such during the special session. The claimants were not clerks at all *during the special session* prior to March 18. Hence they are not within the act of March 3.

Until March 18, there was no Senate committee, and, hence, up to that time there could not have been any clerk to a Senate committee. For this reason *they* are not within the act of March 3.

The act by its plain terms applies only to those who *were* clerks and *while* they were such.

2. Can the clerks in service at the regular session on March 3, and *reappointed* March 18, be paid by virtue of the act of March 3 ?

Clearly not. It appropriates money for those only who were "clerks to committees." Plainly, this means only for the time in which they were such clerks.

But from March 5 to March 18, there was no Senate committee, and hence there could have been no clerk to a committee.

The act is not aided by the resolution.

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A resolution cannot make a party a clerk of a committee by so calling him, or by declaring him to be such when in fact he is not. An *act of Congress* might require accounting officers to give effect to such a declaration, and authorize payment accordingly. That would be legislation. This resolution of the Senate, however, is not legislation; it is not a law; nor can it have the force of law.

The Senate resolution evidently was passed upon the correct idea that from March 4 until March 18 there was no committee, and consequently there could have been no clerk of a committee.

II.—No payment can be made by force of the act of June 15, 1880, to clerks—either those who were or those who were not reappointed—for the period from March 5 to March 18.

1. As to the *per diem* clerks, the appropriation is exhausted.

2. If it were not so, the act, by its terms, limits the appropriation, so far as they are concerned, to clerks who were such during the regular session, and for the period covered by one hundred and twenty-one days. It does not provide the means of making the payment directed by the Senate resolution, but by its terms and purpose denies the right to it.

As neither the act of June 15, 1880, nor that of March 3, 1881, makes an appropriation for the payment of the *per diem* clerks according to the Senate resolution, the effect of the resolution is to be considered :

III.—The resolution cannot *per se* provide the means or appropriate money to make the payment which it directs to be made.

1. By the Constitution, no money can "be drawn from the Treasury but in consequence of appropriations made by LAW." (Art. I, sec. 9, cl. 7.)

This resolution is not a *law*. Legislative power is vested not in the Senate alone, but "in a Congress, * * * which shall consist of a Senate and House of Representatives." (Const., art. I, sec. 1.)

2. The resolution has also to encounter another obstacle.

These clerks had a compensation, "fixed by law," at six dollars per day during the regular session.

The resolution proposes to give them "additional pay, extra allowance, or compensation" for services rendered during the regular session. It must be for *such services*, because it applies *only* to "clerks of the committees of the Senate who held such positions on the fourth day of March, 1881." It cannot be for services rendered from March 5 to March 18, because, as already shown, there was no Senate committee during that time, there could have been no clerk of a committee, and hence no services legally rendered.

Some, if not most, of the clerks of the regular session have not been reappointed, and so are not now clerks. Assuming, then, that the resolution intended to give additional or extra compensation to clerks of the regular session, it must be ineffectual, because the Revised Statutes provide as follows:

"SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulation, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is *authorized by law*, and the *appropriation* therefor *explicitly states* that it is for such *additional pay, extra allowance, or compensation.*"

It is not intended to hold that this section takes from the Senate the right to give to its clerks or employés extra compensation out of its *contingent fund*.

The section, in its broad, general terms, if unqualified by any other provision, would seem to deny such right; but it is to be construed as *in pari materiâ*, with section 3680, which reserves to each House of Congress the right to give extra allowances from such fund to any clerk after he has been employed by a resolution of either House.

IV.—No payment can be made from the Senate "contingent fund." The act of June 15, 1880, (21 Stats., 212,) appropriates—

"For contingent expenses of the Senate * * *.

"For miscellaneous items, exclusive of labor, forty-five thousand dollars."

1. If this appropriation stood alone, *uncontrolled by other legislation*, the Senate could by resolution dispose, *in its own discretion*, of the contingent fund, and so pay these clerks a *per diem* for the time from March 5 to March 18.

The accounting officers of the Treasury Department cannot lawfully call in question the authority of the Senate to dispose of its own contingent fund in its own discretion, unless some *law* has so regulated its expenditure as to restrain the power of the Senate in its use, and impose a duty on executive officers to ascertain what payments can lawfully be made thereout. The Senate is, for some purposes, an independent, co-ordinate branch of the Government, having powers so transcendent and important that no executive or judicial officer can properly arraign the mode in which it shall dispose of its contingent fund, when such mode is not prescribed by a special provision of law. (Seward's case, *ante*, 53; Allen *vs.* Blunt, 3 Story, U. C., 745; P. & T. R. Co. *vs.* Stimpson, 14 Pet., 458; U. S. *vs.* Jones, 18 How., 95; U. S. *vs.* Kaufman, 96 U. S., 567.)

2. The resolution does not in terms declare that payment shall be made from the contingent fund. If, however, the resolution were available, it might properly be held as referring to that fund, since it is the only fund to which it could apply; and the maxim of construction would properly be invoked: *Ut res magis valeat quam pereat*.

The chief importance of the question under consideration lies not in its bearing upon this case, but in its general application in principle, as affecting the *accounts* to be kept and rendered by the Secretary of the Senate to the First Auditor and First Comptroller. Every voucher is to be charged to a proper head of appropriation. (Bender's case, 1 Lawrence, Compt. Dec., 347; Rev. Stats., 3675.)

3. Any payment out of the Senate contingent fund by virtue of the resolution is prohibited by the Revised Statutes, which provide as follow:

"SEC. 3680. *No part of the appropriations which may be at any time made for the contingent expenses of either House of Congress shall be applied as extra allowance to any clerk, messenger, or attendant of the two Houses, or either of them, or as payment or compensation to any clerk, messenger, or other attendant of the two Houses, or either of them, unless such clerk, messenger, or other attendant be so employed by a resolution of one of the Houses; or to any other than the ordinary expenditures of the Senate and House of Representatives.*"*

"SEC. 3682. No moneys appropriated for contingent, incidental, or miscellaneous purposes shall be expended or paid for official or clerical compensation."

If section 3682 should be so construed as to give literal effect to its *general and comprehensive terms*, it would deny the right of the Senate to use a contingent fund for the payment of clerks. But the section is taken from the act of July 12, 1870, (16 Stats., 250, sec. 3,) which sufficiently shows that it is not intended to apply to either branch of Congress, because in that act express provision is made, under the head of "contingent expenses," for the payment of clerks. *This section*, therefore, does not take from the Senate its general parliamentary authority to use its contingent fund in its own discretion. The general terms of the section may be properly restrained, upon the maxim: *Verba generalia restringuntur ad habilitatem rei vel aptitudinem personæ*. Besides such restraint, it may also be construed as *in pari materiâ* with section 3680, which provides, in effect, that no part of the contingent

* As to the compensation to be paid from the contingent funds of the two Houses of Congress, the Revised Statutes provide as follows:

"SEC. 76. No payment shall be made from the contingent fund of either House of Congress, unless sanctioned by the Committee to Audit and Control the Contingent Expenses of the Senate, or the Committee on Accounts of the House of Representatives, respectively."

fund of the Senate "shall be applied * * * as payment or compensation to any clerk, messenger, or other attendant of * * * either [House,] * * * unless such clerk, messenger, or other attendant *be so employed by a resolution of one of the Houses.*"

The twenty-two Senate clerks whose case is now under consideration were not employed by authority of a resolution of the Senate prior to March 18. Until that date they cannot, therefore, be entitled to the benefit of the contingent fund, because section 3680 is *prospective* in its operation, applying only to clerks *after* they have been "employed by a resolution," &c. The *prospective* character of this section is shown by the language employed and well-known rules of interpretation. There is a maxim properly applicable here: *Nova constitutio futuris formam imponere debet, non praterites.* (Broom, Leg. Max., 34; 14 How., 488; 24 *Id.*, 242; 3 Dall., 386, 391; 2 Pet., 380; 2 Show., 17; 2 Wall., 329; 3 Sum., 538; 2 St., 164; 1 W. & M., 323; Hemp., 469.)

A retrospective statute is to be strictly construed. (3 Metc., Ky., 255; 43 Ga., 480.)

A high legal authority lays it down as in general true that no statute is to have a retrospect beyond the time of its commencement. (Bac. Abr. "Statute.")

This principle has been steadily maintained both in England and this country. (Sedgwick, Stat. and Const. L., 161; 15 Ia., 257; 7 Allen, 139; 37 Vt., 599; 1 Cold., Tenn., 398; 57 Pa. St., 209; 30 Md., 500; 27 Beav., 579; 41 Mo., 25; 21 Wis., 268; 105 Mass., 287; 48 N. Y., 57; 22 Tex., 214; 7 Ind., 59; 28 Ga., 597; 26 Ark., 124.)

In the act of June 15, 1880, appropriations are made, under the head of "contingent expenses," for clerks and other employés entitled to *per diem* compensation; while those entitled to annual salaries are appropriated for in the form of a general appropriation.

But the appropriation for clerks is not *technically* made a "contingent fund" by being classed under that head. Its real character is to be determined by the purpose to which it is to be applied. The definition of a technically contingent fund is well understood. (Decoration case, *ante*, 69.)

The appropriation of forty-five thousand dollars "for miscellaneous items" in the act of June 15, 1880, is clearly a "*contingent* fund," or fund for "contingent expenses," within the meaning of section 3680 of the Revised Statutes.

It is placed under the head of "contingent expenses" in the act. This and similar appropriations have always been so classed in the "Digests of Appropriations" made for use in the Departments; and

this usage has been well known in Congress, where these digests are in use by committees of that body.

This appropriation falls within the definition of a contingent fund as recognized and understood. (Decoration case, *ante*, 69.)

An appropriation does not, as before observed, become a contingent fund merely because so called, or placed under such head in a law. Its purpose determines its character.

If it is for purposes undefined, and especially for those almost undefinable, dependent on unforeseen contingencies, it is a contingent fund.

To call it a fund for "miscellaneous items," without defining them or otherwise specifying their use or character, still leaves it in legal effect and technically a contingent fund. This must be so, because otherwise there would be no contingent fund, since no other law provides such fund.

V.—The duty of the accounting officers to reject any voucher of payment under the resolution is so clear as to leave them no discretion, and afford no means of escaping its performance. (Rev. Stats., 52, 56, 57, 58, 59, 191, 236, 248, 269.)

Section 236, Revised Statutes, requires *all* accounts to be settled in the Treasury Department. When there was but one Auditor, under the act of September 2, 1789, (1 Stats., 65,) he adjusted all accounts, including those of this character. No law has assigned them to any but the First Auditor. (See act March 3, 1817, 3 Stats., 366, sec. 4.)

The First Auditor states an account with the Secretary of the Senate as its disbursing officer, and the First Comptroller is required to certify balances. Neither has any discretion to allow vouchers for payments not authorized by law.

VI.—Payment of *per diem* compensation can lawfully be made to clerks appointed on or after March 18. The Secretary of the Senate does not touch upon this matter; but, while on the subject, it may be well to dispose of a question which may arise. The act of March 3 does not in terms *fix a sum per day*, or prescribe a mode of ascertaining the amount of compensation to be paid to the "twenty-two clerks."

The act of June 15, 1880, *did* fix a rate of six dollars per day for twenty-two clerks for the regular session.

Still, the rule of construction is to be regarded as applicable to this act: *Ut res magis valeat quam pereat*. To this extent effect can be given to the act. A rate of compensation can be deduced from the legislation on the subject to which it relates.

The appropriation act of June 15, 1880, made an appropriation for

the payment of *annual* salaries to thirteen clerks of Senate committees named therein, and then made an appropriation—

“For twenty-two clerks to committees, at six dollars per day, during the [regular] session, fifteen thousand eight hundred and forty dollars.”

The sum appropriated was not sufficient to pay for clerks at the special session. In anticipation of the latter session, the “*deficiency*” act of March 3, 1881, made an appropriation for the same number—“twenty-two clerks to committees”—without any provision for clerks with annual salaries.

It must, therefore, be evident that Congress intended the prior rate of six dollars *per diem* to continue; with no provision, however, that the days of the special session should be counted at more than their actual number, differing in this respect from the case of the regular session.

The view, which regards the two laws together as indicating a *per diem* rate of six dollars, is confirmed by the fact that the *deficiency* act is merely *supplemental* to the regular act, the *per diem* rate of which is, by inference, applied to the supplemental act.

The question submitted by the Secretary of the Senate is decided in the negative.

TREASURY DEPARTMENT,

First Comptroller's Office, March 24, 1881.

IN THE MATTER OF THE LIABILITY OF THE UNITED STATES FOR A JUDGMENT RECOVERED AGAINST AN INTERNAL-REVENUE OFFICER WITHOUT NOTICE TO THE PROPER DISTRICT ATTORNEY OF THE PENDENCY OF THE SUIT.—DUNNEGAN'S CASE.

1. A party who recovers a judgment against an internal-revenue officer is not entitled to have it paid, under section 989 of the Revised Statutes, unless the attorney of the United States for the proper district had been notified or had had knowledge of the pendency of the action in which it was rendered; so that he could have appeared and made defence.
2. When the record of the action is silent as to notice or knowledge, neither will be presumed.
3. If a revenue officer who is sued for an official act excuses or excludes the proper attorney of the United States from appearing, in order to protect the interests of the United States, such officer is not entitled to be repaid the amount of the judgment.
4. An attorney of record, who prosecutes an action to judgment against a revenue officer, has no authority, merely by virtue of his position as such, to demand payment of a judgment from the Government under section 989 of the Revised Statutes.

5. A joint authority to two attorneys to collect money from the Government does not authorize payment to one of them.
6. A power of attorney from a claimant against the Government is required, as evidence of authority to an attorney or agent to *initiate* or conduct proceedings to secure the allowance of a claim. So, a power of attorney is necessary to enable an attorney or agent to receive payment of a claim.
7. An internal-revenue officer, against whom judgment is rendered for an official act, cannot, under section 3220 of the Revised Statutes, be repaid the amount of such judgment, unless the attorney of the United States for the proper district had notice or knew of the pendency of the action in which it was rendered.
8. If the officer has paid a judgment, he is generally entitled to be reimbursed by the Government. If he has not paid the judgment, it may nevertheless be paid to the *judgment creditor by the Treasury Department on the application of such officer.*
9. A certificate of probable cause, or that the officer acted under the direction of the Secretary of the Treasury or other proper officer of the Government, is requisite to authorize payment of a judgment against a revenue officer, when application for payment is made *by the judgment creditor* under section 989 of the Revised Statutes.
10. A valid certificate can only be made when the proper attorney of the United States has, or is chargeable with, notice of the application for such certificate.
11. Whether such certificate can be made after the term at which final judgment is rendered—*quare?*
12. The question whether a certificate of probable cause is required to authorize payment of a judgment against a revenue officer on his application, under section 3220 of the Revised Statutes, considered.
13. There is no appropriation applicable to the payment of a judgment rendered against an internal-revenue officer in 1877.
14. A claim cannot be reported to the Speaker of the House of Representatives under the act of June 14, 1878, (20 Stats., 130,) unless there has been an appropriation for its payment which has been exhausted or carried to the surplus fund.

On September 7, 1874, Ezekiel Dunnegan filed a petition in the superior court of Fulton county, Georgia, against Charles B. Blocker, Wm. Jennings, and James Atkins, alleging that they did, on the 14th February, 1871, with force and arms, unlawfully seize (Rev. Stats., 3166) and destroy a distillery and other property of the petitioner; and asking judgment for damages.

There are five counts in the petition, each alleging that the acts complained of were done "maliciously and without any reasonable or probable cause." Issue was duly joined on all the counts.

Blocker and Jennings waived process, and entered their appearance on the day when the petition was filed; Atkins was duly made defendant.

The case was transferred on *certiorari*, in November, 1875, to the circuit court of the United States for the northern district of Georgia.

September 28, 1877, the case was dismissed as to Jennings.

September 29, 1877, the case was tried by a jury; verdict was rendered in favor of plaintiff against Blocker for \$750 damages, "and nothing against James Atkins;" whereupon judgment was, on the same day, rendered in favor of the plaintiff on the verdict for \$750 damages, and \$83.70 costs.

The copy of the record which is filed with the claim does not show in *extenso* any motion filed to set aside the verdict, or in arrest of judgment, or to set aside the judgment, nor contain any motion in writing for a new trial. The following is all that appears in the record as to new trial and proceedings after judgment:

"Motion by Blocker for a new trial filed October 18, 1877.

"Motion for a new trial overruled June 19, 1880.

"ACTION FOR TORTS.

"EZEKIEL DUNNEGAN

vs.

WILLIAM JENNINGS, CHARLES B. BLOCKER,
and JAMES ATKINS.

} In U. S. Circuit Court,
Northern District of
Georgia.

"Verdict for defendants, Atkins and Jennings, and verdict and judgment for plaintiff against defendant, Blocker, for \$750 and costs, September term, 1877.

"It is hereby certified that there was probable cause for the acts done by the defendant, Charles B. Blocker, deputy collector of internal revenue, on which said suit was founded, and for which the judgment against said Blocker for the sum of seven hundred and fifty dollars and costs was recovered.

"In open court, this 23d day of June, A. D. 1880.

"W. B. WOODS, Judge.

"Filed in clerk's office June 23, 1880.

"A. E. BRECK, Clerk."

John A. Wimpey and E. N. Brayles were attorneys of record for plaintiff, and other attorneys appear of record for defendants.

It does not appear that any attorney of the United States had knowledge or notice of the pendency of the action, or any proceeding therein; nor that any formal motion was filed asking for a certificate of probable cause. The Secretary of the Treasury did not instruct the attorney for the United States in the district not "to appear in behalf of the defendants." (Rev. Stats., 771.) Blocker was in 1877 deputy internal-revenue collector and special assistant assessor of the fourth district of Georgia.

On August 4, 1880, E. N. Brayles, as attorney for Dunnegan, filed with the collector in Georgia a copy of the record of the judgment, and an application for its payment.

On August 6, 1880, the collector wrote to the Commissioner of Internal Revenue, stating that "Dunnegan has [had] fled the country," and

that there had been submitted to him, (the collector,) to be forwarded for payment, a claim, being the judgment and costs aforesaid; and it was duly forwarded.

February 5, 1881, the Commissioner of Internal Revenue examined the claim, and allowed \$833.70. This allowance was approved January 29, 1881, by the Secretary of the Treasury, in the form prescribed by the regulations. (Rev. Stats., 3220; Flack's case, 1 Lawrence, Compt. Dec., 187; Savings-Bank case, *Id.*, 194; Davis's case, *Id.*, 258.)

At the time of the allowance of this claim by the Commissioner of Internal Revenue, he did not have a statement or copy of the evidence submitted to the jury on the trial of the issue. He had merely a copy of the record of the judgment and proceedings of the court, with sundry letters relating to the claim, which furnish no evidence of a claim outside of, or back of, the record of the judgment. This record, therefore, furnishes the *only evidence* of the merits of a right to a refund or repayment to the claimant. The claim made can arise, therefore, upon the judgment only, and not upon any portion of section 3220 of the Revised Statutes relating to refunding of taxes "erroneously or illegally assessed." If the claim arises under this section, it comes only under the clause which provides for the repayment of "such sums as may be recovered * * * in any court for * * * damages and costs."

February 7, 1880, the Fifth Auditor stated an account on the claim for \$833.70, for "refund of taxes erroneously assessed and collected."

This statement of account is now presented to the First Comptroller, to decide whether he will certify a balance to be paid. (Rev. Stats., 191.)

Griswold & Thompson submitted argument on behalf of *Brayles*.

1. The attorney of record in the suit has authority to collect the judgment. (*Osborne vs. U. S. Bank*, 9 Wheat., 738; *Hill vs. Mendenhall*, 21 Wall., 454; *Ex parte Garland*, 4 Wall., 379; *U. S. vs. Curry*, 6 How., 106; *Union Bank vs. Geary*, 5 Pet., 99; *Erwin vs. Blake*, 8 *Id.*, 18; *Morton's case*, 2 Show., H. L., 138; *Bracket vs. Norton*, 4 Conn., 525; 2 Chit. Cont., 11 Am. ed., 816, 1097; *Dearborn vs. Dearborn*, 15 Mass., 316; 1 Vt., 73; 6 Eng., 212.)

2. As to the construction of section 989 of the Revised Statutes, in advancing the remedy, see *Potter's Dwarris*, 184, n. 6; *Id.*, 203, n. 20; *Id.*, 223; *Martin vs. Mayor*, 1 Hill, 545; *Malcomb vs. Rogers*, 5 Cowen, 188; *Andrae vs. Redfield*, 12 Blatch., 407.

The law requiring the judgment to be paid is *mandatory*. So far as it takes away a right to execution, it is of doubtful constitutionality.

3. A "regulation" of a Department cannot defeat a law.

The Revised Statutes contains these sections:

"SEC. 771. It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable

under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury." (Act Sept. 24, 1879, sec. 35, 1 Stats., 92; act March 3, 1863, sec. 13, 12 Stats., 741.)

"SEC. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue, for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury. (Act March 3, 1863, sec. 12, 12 Stats., 741.)

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty: *Provided*, That where a second assessment is made in case of a list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, unless it is proved that said list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation." (Act July 13, 1866, sec. 9, 14 Stats., 111; act Dec. 24, 1872, sec. 1, 17 Stats., 401; act June 30, 1864, sec. 44, 13 Stats., 240; act March 3, 1865, sec. 3, 13 Stats., 483.)

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The Government is, for several reasons, not liable to pay the judgment in this case:

I.—Notice of the pendency of the suit, in which judgment was rendered, to the attorney of the United States, in due time to enable him to make defence, was requisite to fix a liability against the Government. If the plaintiff desired to avail himself of such liability, he might have given the notice. If the defendant desired to be reimbursed for any

judgment against him, he might have given the notice. If the attorney of the United States, by any means, knew of the commencement of such suit, even without notice by a party, such knowledge may be considered as equivalent to notice. (*Jones vs. Vanzandt*, 2 McLean R., 611.)

1. It cannot be presumed that the *notice* was given. The law does not require the notice to appear of record. It is a matter resting *in pais*, and hence must be proved. (*Sallu's case*, 1 Lawrence, Compt. Dec., 223; *Cooley*, Const. Lim., [17 n.,] 4th ed., 23.)

It cannot be presumed that the attorney for the United States *knew* of the pendency of the suit and refused to appear therein, for that would be to presume that an officer neglected his duty. The law presumes that every officer does his duty. (*Wade on Not.*, sec. 1302; *Russell vs. Beebe*, Hemp., 704; *Dunlop vs. Munroe*, 1 Cr. C. C., 536; *Bottomley vs. United States*, 1 Story, C. C., 145.)

2. On the plainest principles of justice this notice or knowledge is necessary. The idea that the United States, or any party interested in a suit, can incur a liability without an opportunity to appear and defend, is abhorrent to all reason. To so hold would enable parties to a suit, by collusion and fraud, to charge the Government with the payment of vast sums without any liability in reason or law. It would defeat the evident purpose of the statute, which was to protect officers by a defence made by the proper district attorney, in order to save the Government from any unlawful or unreasonable charge, and to prevent collusions by which fraudulent claims might result in judgments. Sections 771 and 989 are *in pari materia*; they are to be construed together; and the plain intent of Congress is to be carried out.

Why provide by law that the district attorney shall "appear in behalf of defendants," if parties in interest are not obliged to give him such notice as will enable him to appear?

The parties to the action must know of its pendency; the attorney of the United States does not necessarily have such knowledge.

3. There is abundant *authority* for requiring the notice to the attorney of the United States.

Under the statute, the Government occupies the position of giving an obligation of indemnity that the officer sued shall be *repaid* the "full amount of such sums of money as may be recovered against him." The Government is an *indemnifier*, or indemnitor, if words unknown to Webster may be used. The obligation is collateral. It is well settled that a guarantor is only liable when duly notified by the principal debtor of every fact known to him, and not known to the guarantor,

necessary to make defence against the liability. On principle, an *indemnitor* is entitled to the same notice. (Wade, Law of Not., sec. 389, Chicago ed., 1878; 2 Graham & Waterman, New Trials, 139; Supervisors *vs.* Briggs, 2 Denio, 26; s. c., 2 Hill, 135; Russell *vs.* Clark, 7 Cr., 69; Clark *vs.* Carrington, 7 *Id.*, 322; Cremer *vs.* Higginson, 1 Mason, 323; Sallu's case, 1 Lawrence, Compt. Dec., 223; Hutz *vs.* Karthause, 4 Wash. C. C., 6; P. M. Gen. *vs.* Ustick, *Id.*, 348; 9 Wheat., 720; 11 *Id.*, 184; Wells, Res Adjudicata, ch. xiv, p. 155, secs. 183, 186; Duffield *vs.* Scott, 3 T. R., 374; Smith's Lead. Cas., 139; 2 Greenleaf, Ev., sec. 116.)

Wells says that "as *against* the principal, a surety is only concluded by a judgment rendered in a suit which *he had an opportunity to defend.*" (Thomas *vs.* Hubbell, 15 N. Y., 407; s. c., 35 *Id.*, 120; Annett *vs.* Terry, *Id.*, 256; State *vs.* Jennings, 14 Ohio St., 76; Kip *vs.* Brighau, 6 Johns., 159.)

A guarantor may even control a suit against the principal when the latter refuses to make defence. (People *vs.* Irving, 1 Wend., 20.)

In Duffield *vs.* Scott, 3 Term R., 377, it is said that—

"The purpose of giving notice is not in order to give a ground of action; but, if a demand be made which the person indemnifying is bound to pay, and notice be given to him, and he refuses to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action is not bound to pay the money."

4. There is another ground upon which notice is requisite. The *acceptance* by the *claimant* in the judgment, and by the *officer sued*, of the guaranty and indemnity offered by the Government is essential to create a liability against the latter. No law compels such acceptance. Neither party in interest may desire it. They may refuse it for the very purpose of securing the privilege of having a suit conducted without the intervention of the attorney of the United States. Notice is essential as evidence of the acceptance. (Brandt on Suretyship and Guaranty, secs. 157, 175; Edmonston *vs.* Drake, 5 Pet., 624; Douglass *vs.* Reynolds, 7 *Id.*, 113; Lee *vs.* Dick, 10 *Id.*, 482; Adams *vs.* Jones, 12 *Id.*, 207.)

The liability of the Government arises not at common law, but by statute. Every step contemplated by the statute is requisite to create the liability. The statute is to be strictly construed and literally and fully pursued; otherwise the liability does not arise. These are principles so familiar as scarcely to require a citation of authority. (2 Inst., 388; Dwarrris, Stats., 611; Commonwealth *vs.* Justices, 5 Mass., 436.)

The Government stands towards the plaintiff in the relation of one who guarantees or makes good all that has been lost. The same principle of notice applies in such case.

"It is believed to be a universal principle that no man ought to be bound by a judgment where he had no notice of the proceedings or any opportunity to defend himself. To hold otherwise would be contrary to every maxim of justice." (*Joslin vs. Coffin*, 5 How., Miss., 539; *Garner vs. Carroll*, 7 Yerg., 365.)

The Government can only be held liable by "due process of law," or upon such conditions as the law prescribes; and where a condition requires judicial action to render the Government liable, notice of the action is essential. (*Sallu's case*, 1 Lawrence, Compt. Dec., 223; 15 Op. Att.-Gen., 578; *Florida vs. Georgia*, 17 How., 478; *Darling vs. Gunn*, 50 Ill., 424; *Ray Co. vs. Barr*, 57 Mo., 290; *Com'rs vs. Claw*, 15 Johns., 537; *Adams vs. Oaks*, 20 *Id.*, 282; *Peters vs. Newkirk*, 6 Cow., 103; *Elmendorf vs. Harris*, 23 Wend., 628; *Martin's case*, 1 Ohio, 156; *Patterson vs. Prather*, 11 *Id.*, 35; *Hambleton vs. Dempsey*, 20 *Id.*, 171; *Reynolds vs. Stansbury*, *Id.*, 353.)

Res inter alios acta alteri nocere non debet. (Broom, Leg. Max., 333, 954; Wing., Max., 327.)

"A transaction between two parties in judicial proceedings ought not to be binding on a third, for it would be unjust to bind any person who could not be admitted to make a defence." (Broom, Leg. Max., 955; *Ray Co. vs. Barr*, 57 Mo., 290; *Wade*, Law of Not., sec. 1184; *Haley vs. Williams*, 8 S. & M., Miss., 487.)

It must be presumed that the neglect to give notice was prejudicial to the United States. (*Wade*, Law of Not., sec. 417; 9 S. & R., 198; 59 Pa. St., 178; 71 *Id.*, 100; 25 Mich., 351; 33 Ia., 293; *Breedlove vs. Nicolet*, 7 Pet., 434.)

5. If a revenue officer, sued for an official act, employ his own attorney to defend, and excuse or exclude the attorney of the United States from the management of the defence, the Government is not liable, on the application of such officer, to pay any judgment therein rendered against him. By taking such a course, he waives *his* remedy against the Government. The effect of the statute is to create a liability against the Government *sub modo*, on condition that its authorized attorney be permitted to appear and make defence. The Government is entitled to the protection afforded by the skill of its attorney. When, as in this case, an attorney of record appears for the defendant, and there is nothing in the record to charge the attorney of the United States with knowledge or notice, it may well be inferred that the defendant waived any claim to indemnity by the United States.

The officer against whom the judgment was rendered is not, in fact, asserting any claim for payment of the judgment.

II.—There is no valid application for the payment of the judgment. The application therefor to the Commissioner of Internal Revenue is made by *one* of the attorneys of record of the plaintiff in the suit. The plaintiff has “fled the country;” he does not ask for payment, and has not given a power of attorney to any one to act for him in this application. Unless *one* of the *two* attorneys of record in the judgment has, by virtue of his position as such, the right to make the application, the latter is clearly unauthorized.

An attorney-at-law is, as such, an officer of the court in which he is admitted to practice. His office as such exists at common law; and in some of the States it is recognized and regulated by statute. No act of Congress defines the qualifications of an attorney; but the courts of the United States have always properly asserted the common-law power to admit persons duly qualified to practice, and to suspend and otherwise punish them for contempt or other flagrant misconduct. If the attorney violate or neglect his duty, the court has jurisdiction over him to command or punish; and, being its sworn officer, it may proceed against him in a summary manner. The Treasury Department has not such jurisdiction over attorneys or agents who prosecute claims before it. Here, the relation subsisting between a claimant and his attorney is that of principal and agent, rather than that of attorney and client in proceedings in court. The latter relation cannot exist in any matter unconnected with an existing or contemplated power of a judicial tribunal to supervise the conduct of the attorney, and afford redress to the client in case of his misconduct. The authority of an attorney-at-law to appear in a cause is generally presumed by the court, unless the contrary appear; and such authority continues until final judgment. (*Richardson vs. Talbot*, 2 Bibb, Ky., 382; *Jackson vs. Bartlett*, 8 Johns., 361; *Hinkley vs. St. Anthony's Falls, &c., Co.*, 9 Minn.; *Kamm vs. Stark*, 1 Sawyer, 547; *Wade*, Law of Not., sec. 1323.)

His authority for the purpose of causing execution to issue continued at common law for a year and a day after entry of judgment, unless the latter were in the meantime satisfied, or the authority were determined by some act of his client. (*Nichols vs. Dennis*, Charl. Ga., 188; *Gray vs. Wass*, 1 Maine, 257; *Flanders vs. Sherman*, 18 Wis., 575.)

Under a general retainer to prosecute or defend an action, the attorney is authorized to prosecute or defend for the purpose of obtaining a final judgment in the cause. His authority is not presumed to extend beyond the termination of the suit. Upon entry of judgment he

may immediately bring action to recover just compensation for his services. (*Adams vs. Fort Plain Bank*, 23 How. Pr. N. Y., 45.)

The courts presume authority in the attorney, after he obtains a judgment in favor of his client, to take out execution therefor and to receive the money collected thereon. (*Erwin vs. Blake*, 8 Pet., 18; s. p., 5 Pet., 98.) He has power to stay an execution, although this may discharge a surety. (*Banks vs. Evans*, 18 Miss., 35; s. p., *Id.*, 333.) The exercise of these duties or powers constitutes a proceeding on the judgment; but it is laid down in *Pitt vs. Dequison*, 37 Barbour, N. Y., 97, that an attorney employed to defend a suit is only authorized to appear and act for the party in the proceedings which form part of the action. It is well settled that the authority to act continues until the litigation is ended, unless the attorney be meanwhile dismissed or he withdraws from the litigation by permission of the court. (*Langdon vs. Castleton*, 30 Vt., 285; *Love vs. Hall*, 3 Yerg. Tenn., 408.)

At common law, payment of money to the plaintiff's attorney by the defendant is a good payment, if made within a year and a day after judgment. (2 Tuck. Com., b. 3, 4; 1 Call, 147; 1 Wash. Va., 10.)

The attorney represents his client *only in court*; he has no right to enter into private, executory, or collateral contracts for the client. (2 Call, 503; 7 Cr., 449, 452; 5 Rand. Va., 639.)

A claim before the Treasury Department is not a matter in litigation; it is not a proceeding in aid of execution; it is not a matter in which the relation of attorney and client, such as obtains in judicial proceedings, can be said to exist. In view of the settled limitations here referred to, it must be held that the retention of the attorney in the suit on which this claim is founded is not an authority which this Department can properly recognize in making application for the payment of the claim. In such cases the Department can only recognize the principal or his duly authorized agent or attorney, and the latter must file written evidence of his authority. The like rule obtains also in the Court of Claims.* (14 Ct. Cls., iii.)

* On this subject the following circulars are applicable:

Circular in relation to Powers of Attorney.

1876.
Department No. 130. }
Warrant Division No. 2. }

TREASURY DEPARTMENT, October 10, 1876.

The order of the Department of April 16, 1875, relating to powers of attorney, is hereby revoked, and the following adopted in lieu thereof:

In every case to be finally adjudicated in this Department, the attorney shall present a letter of attorney from the claimant to prosecute the case, and shall be regarded as the attorney in such case, with the right to receive any draft therein. The claimant may change his attorney at any time, with the consent of the proper officers of the Department.

In cases certified for payment by the Court of Claims, or by any commission created by Congress, the persons certified by said court or commission as the attorneys of

The attorney-at-law who obtained the judgment in the present case is not, therefore, by virtue of his office and retainer, such an agent or attorney, inasmuch as he is not acting under authority of the judgment creditor.

By the original retainer for the action in court, the plaintiff had the protection and control of the court over the attorney, and a right to summary judicial remedies to secure faithful conduct and the payment of money collected. The plaintiff has no such protection or remedy, as against an attorney, in presenting or collecting this judgment at the Treasury Department, even if thereto authorized.

The original retainer does not give the authority now claimed for it. Agents or attorneys may be, for sufficient cause, suspended from the right to prosecute a claim in the Treasury Department; but this is no adequate redress or protection for clients. (13 Op. Att.-Gen., 15; 16 *Id.*, 488.)

If it could be assumed that the two attorneys of record who obtained the judgment in the circuit court have authority to present and collect it at the Treasury Department, they would still be obliged to act jointly in the matter. One alone could not exercise the power. Since they acted jointly in the suit in court, it is to be presumed that they did so in the exercise of an authority requiring both so to act.

Story says:

"It is a general rule of the common law that where an authority is given to two or more persons to do an act, the act is valid to bind the principal, only when all of them concur in doing it; for the authority is construed strictly, and the power is understood to be joint and not several." (Agency, 42; *Greenleaf vs. Birth*, 5 Pet., 139.)

Where a party engages an association of lawyers, he is entitled to the services of every one of them. The duty of each is a personal duty

record shall be regarded as such by this Department, and be entitled to receive the drafts in such cases.

In all cases drafts for claims will be made to the order of the claimant, and will be delivered to the proper attorney, according to this order.

The Secretary reserves the right in all cases to make such special orders as may be proper.

LOT M. MORRILL,
Secretary.

Circular—Delivery of Drafts to Claimants and Attorneys.

1880.
Department No. 62. }
Secretary's Office. }

TREASURY DEPARTMENT,
Washington, D. C., July 19, 1880.

Hereafter, the accounting officers will decide what persons as attorneys or claimants are entitled to receive drafts under the rules of the Department. This practice will prevent the delay occasioned by sending the papers to the Secretary or Assistant Secretary for such decision.

H. F. FRENCH,
Acting Secretary.

and trust, which cannot be delegated to or performed by another. (*Walker vs. Goodrich*, 16 Ill., 341; *Smith vs. Harvie*, 31 *Id.*, 62; *Morgan vs. Roberts*, 38 *Id.*, 65; *Cornelius vs. Wash, Breese*, Ill., 63.)

A party who, with notice of the fact, pays money to one of the attorneys in a cause, who is not the attorney on record, and who afterwards absconds, pays it in his own wrong. (*Weist vs. Lee*, 3 Yeates, Pa., 47.)

Where three members of the bar entered their appearance for the defendant, having been employed generally to appear for him, and no warrant of authority was given to either: *Held*, that the attorney's fee was to be divided equally between them. (*Hurst vs. Durnell*, 1 Wash. C. C., 438.)

But if a warrant of attorney had been given to the attorney first employed, he would have been entitled to the fee. (*Id.*)

At common law, a naked power given to several persons, such as that conferred upon executors by will to sell and convey an interest in an estate, can only be executed by the joint action of the donees of the power. (Sug. on Pow., 129, *et seq.*; *Wardwell vs. McDowell*, 31 Ill., 364.)

III.—The certificate of probable cause is not so made as to authorize payment by the United States.

The application for payment purports to be made on behalf of the *judgment creditor*, under section 989 of the Revised Statutes, the only law under which *he* could so apply.

That section is taken from the act of March 3, 1863. (12 Stats., 741, sec. 12.) It originally applied apparently only to judgments against officers under the customs laws. (*Ins. Co. vs. Ritchie*, 5 Wall., 543; *Phila. vs. Collector, Id.*, 720; *Campbell vs. James*, 18 Blatch. C. C., 196.)

But under the rule of construction adopted for the Revised Statutes, the provisions of that section would seem to apply also to actions against internal-revenue officers. (*U. S. vs. Sherman*, 98 U. S., 566; *U. S. vs. Bowen*, 100 U. S., 513; *Audit case*, 1 Lawrence, Compt. Dec., 37, 44, *n.*)

That section requires a certificate of probable cause as a condition precedent to payment of the judgment. Thus, in *U. S. vs. Sherman*, 98 U. S., 567, where an agent of the Treasury Department had been sued under a similar statute, the Supreme Court said:

"It was obtained not by the agent of the Treasury Department sued, but on motion of the relator, who was the plaintiff in the suit. Conceding, however, as we do, that the circuit court was empowered to give the certificate on the request of either party, it is to be considered what was the liability fastened thereby upon the United States.

"The act of Congress enacts that when the certificate of probable cause is given, the amount recovered shall, upon final judgment, be paid out of the appropriation from the Treasury. When the certificate is given the claim of the plaintiff in the suit is practically converted into a claim against the Government; but not until then.

"Before that time the Government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given."

The certificate of probable cause now under consideration did not convert the judgment into a claim against the United States.

1. It is a sufficient objection to the certificate that it was made without notice to the United States attorney for the proper district. The court, in making it, exercised a *special, statutory, and limited jurisdiction*. The authority to make it was no part of the general jurisdiction of the court. It does not appear from the record that such notice was given; and, under the special jurisdiction of the court, no presumption arises that the notice *was* given. (Sallu's case, 1 Lawrence, Compt. Dec., 223; 2 Salk., 457; Smith *vs.* Goff, 2 Ld. Raym., 1126; 6 Mod., 182, 200, 259, 288; 4 *Id.*, 230, 239; 5 *Id.*, 330; Com. Dig., tit. "Pleader," C. 61, 75; Doug., 71; Str., 531, 1164; 2 Lilly, 151, 356.)

Assuming that the motion for a certificate of probable cause, made nearly three years after judgment, was properly made in point of time, what would be the effect of the granting of the certificate? Clearly to render the Government liable for the judgment debt and to affect *pro tanto* its interests. The motion would be substantially against the United States.

It is a general rule that "when the motion extends to and affects the interest of the party against whom the motion is made beyond his process, such party or his attorney must be served with notice." (Wade, Law of Not., sec. 1184; Powell *vs.* Howell, 21 Geo. R., 214; 30 *Id.*, 674; Haley *vs.* Williams, 8 S. & M., Miss., 487; Den *vs.* Bacon and Sharp, 4 Wash. C. C., 578; Ray Co. *vs.* Barr, 57 Mo., 290.)

This is especially the case in proceedings after final judgment. (Smith *vs.* Wilson, 26 Ill., 186; Gardner *vs.* Cline, 2 Western [Cleveland] Law Monthly, 329; Wade, Law of Not., sec. 1323; Kamm *vs.* Stark, 1 Sawyer, 547; Caney *vs.* Silverthorne, 9 Cal., 67.)

An order of a judge to stay proceedings and a certificate of probable cause are the same in effect, and require the same practice as to the service of a notice of motion and copies of affidavits, in order to prevent further proceedings. (Bailey *vs.* Caldwell, 3 Johns., 451.)

2. If the jurisdiction is not special, statutory, and limited, but a part of the general jurisdiction, notice will nevertheless not be presumed.

At most, it could only be presumed as against parties to the record, and not as against the Government, the liability of which depends on the certificate. The Government had a right to be heard upon the motion. The attorney for the United States was not an attorney of record, and it cannot therefore be presumed that he had notice of the motion. (Wells, *Res Adjudicata*; Broom, Leg. Max., 333, 954.)

Whenever a court, or any person acting under legal authority, is to act judicially, or to exercise a discretion in a matter affecting the rights of another, the party thus to be affected is to have reasonable notice of the time and place, when and where, such act is to be done, to the end that he may be heard in defence or for the protection of those rights. (New Jersey Turnpike *vs.* Hall, 17 N. J. L., 337; Kinderhook *vs.* Claw, 15 Johns., 537.)

The general rule is, that when an attorney is employed, all papers in the cause must be served upon him; and the only exception to the rule is where the object is to bring the party into contempt. (Flynn *vs.* Bailey, 50 Barb., 73; 26 How. Pr., 60; 15 Abb. Pr., 135; 18 *Id.*, 264.)

3. There may be some doubt as to the *time* when the certificate of probable cause can be lawfully made.

In the case of the United States *vs.* Sherman, (98 U. S., 566,) a certificate made after the term of court at which *final* judgment was rendered, seems to have been regarded as valid; but the question of its validity did not arise, and was not discussed.

In the case now under consideration final judgment was rendered September 29, 1877; the certificate was not made until June 23, 1880.

A valid certificate modifies the effect of the judgment, by taking away the right to issue execution thereon. This impairs the force of the judgment.

a. It may well be doubted whether such certificate can be made after the term at which final judgment is rendered.

If a court may modify the effect of a judgment three years after its rendition, why not ten years thereafter? In this event, nothing will ever be settled by it. (Scott *vs.* Hore, 1 Hughes, C. C., 167-8.)

If it can be so subject to judicial discretion, what need of a writ of error?

Of course, when there has been a *motion* made at the judgment term to set aside the judgment, and such motion has been continued for future action, if the judgment be thereafter set aside on the motion, or on *petition*, it may be said that possibly there was no *final* judgment.

It is a general rule that "judicial acts by a judge after the expiration of the term are absolutely void," and that the consent of parties does not

confer jurisdiction. (5 Dana, Ky., 11; 10 Mich., 338; 6 How. Pr., 198; 15 Pa. St., 18; 43 N. H., 114; *Breedlove vs. Nicolet*, 7 Pet., 433; *Bank vs. Moss*, 6 How., 31; *Albers vs. Whitney*, 1 Story, 310; *Brush vs. Robbins*, 3 McL., 486; *Brown vs. Bartlett*, 2 Ala., 29; *Allen vs. Bradford*, 3 *Id.*, 281; *Gibson vs. Wilson*, 18 *Id.*, 63; *Harris vs. Billingsly*, *Id.*, 438; *Harrison vs. State*, 10 Mo., 686; *Halley vs. Band*, 1 Hen. & M., Va., 25; *Morrison vs. Dapman*, 3 Cal., 255; *De Castro vs. Richardson*, 25 *Id.*, 49; *Willson vs. McEvoy*, *Id.*, 169; *Pool vs. McLeod*, 9 Miss., 391; *Russell vs. McDougall*, 11 *Id.*, 234; *Copwood vs. Prewett*, 30 *Id.*, 206; s. p., 1 Ind., 516; *Cobb vs. Wood*, 1 Hawks, N. C., 95; *Botkin vs. Commissioners*, 1 Ohio, 375; *Green vs. Dodge*, 3 *Id.*, 486; *Reynolds vs. Stansbury*, 20 *Id.*, 348; *Swift vs. Fairs*, 11 Tex., 18; *Wheeler vs. Goffe*, 24 *Id.*, 660; *Lovejoy vs. Irelan*, 19 Md., 56; *Williams vs. Banks*, *Id.*, 524; *Coelle vs. Lockhead*, Hempst., 194; *Pitman vs. Lowe*, 24 Ga., 429; *Atkins vs. Hinman*, 7 Ill., 437; *Elston vs. Dewes*, 28 *Id.*, 436; *Satterlee vs. Pierce*, 22 Ind., 116; *Hamilton vs. Burch*, 28 *Id.*, 233; *Haydel vs. Roussel*, 1 La. Ann., 35; *Wiley vs. Yale*, 1 Metc., Mass., 553; *Chamberlain vs. Crane*, 4 N. H., 115; *Rogers vs. Rogers*, 1 Paige, N. Y., 188; *Sprague vs. Jones*, 9 *Id.*, 395; *S. F. Canal Co. vs. Gordon*, 2 Abb., U. S., 484; *Calk vs. Stribling*, 1 Bibb, 128; *Cook vs. Bay*, 4 How., Miss., 485.)

b. It cannot be said that, in the present case, the *motion* for a *new trial* kept the judgment within the control and jurisdiction of the court. If there was such a motion, and the copy of the record is complete, it was very informal, since no motion in form appears in the copy.

There are two modes of obtaining a new trial; one by *motion*, the other by *petition*. (Rev. Stats., 726, 987, 1087, 1088; Conkling's Treatise, 35, 450; 2 Abbott's Pr., 163, 199.)

The Revised Statutes provide as follow:

"SEC. 726. All of the said courts [of the United States] shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law."

"SEC. 987. When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void."

c. If it must be presumed that a motion for a new trial was in fact filed, though it does not appear in the record, or if the entry as to the new trial appearing in the record be sufficient in a proper stage of the case, it could have given no authority to make a certificate of probable cause after the end of a term in which final judgment was entered. The entry of judgment disposes of a pending motion for a new trial, and there is no power to modify the effect of a *final* judgment after the judgment term. (Craig *vs.* Craig, 6 J. J. Marsh., 171; Young *vs.* State, 6 Ohio, 485; Arnold *vs.* Jones, Bee, 104; U. S. *vs.* Hastings, 5 Cr. C. C., 115; 1 Sellon's Practice, 482, 497; Steph. Pl., 94; 2 Tidd. Pr., 8th ed., 913, 935; Duchess of Mazarene case, 2 Salk., 246; Cox *vs.* Kitchen, 1 Bos. & P., 238; Hilliard, New Trials, 1; *Id.*, ch. 2, sec. 28; *Id.*, ch. 5, sec. 1; Waterman, New Trials; Walker, Am. Law, 7th ed., 646; 1 Ga., 252; Candler *vs.* Hammond, 23 Ga., 496; 1 Kelly's Ga. R., 253; 7 Price, 566; Spanagel *vs.* Dellinger, 34 Cal., 476; Buckner *vs.* Cowley, 1 T. B. Mon., 3; 13 B. Mon., 234; Harris *vs.* Ray, 15 *Id.*, 628; 1 Fla., 197; 4 Ill., 406; 26 *Id.*, 64; Hall *vs.* Nees, 27 *Id.*, 411; McIntire *vs.* People, 28 *Id.*, 514; 1 Iowa, 570; 19 Pick., 311; 10 Wis., 505; Prentiss *vs.* Danaher, 20 *Id.*, 311; 6 Ind., 55; 11 Mo., 116; 2 Dallas, 118; 3 Tex., 17; 7 Dana, Ky., 253, 472; Bank *vs.* Balloccq, 19 La. An., 376; 6 Ala., 557.)

The statute provides specially what may be done *after judgment*. Then, a *petition* for a new trial is authorized. This shows that a *motion* is not the proper proceeding *after judgment*, unless followed by a petition. (Arnold *vs.* Jones, Bee, 104; Scott *vs.* Hore, 1 Hughes, C. C., 167.)

d. The continuance of such motion and the overruling of it at a subsequent term give no authority to the court to do any act which will impair the force of the judgment. A valid certificate of probable cause would, under the statute, have that effect.

A final judgment is *res judicata*; its effect cannot be impaired while it remains in force.

If, on motion for a new trial, followed by a petition, the judgment be set aside at a subsequent term, the former judgment has no force. The statute says as to *such* case: "If a new trial be granted, the former judgment shall be *thereby* rendered void." (Rev. Stats., 987.)

The inference is, that if not *so* set aside, the former judgment stands in full force and is final. No statute or principle of the common law gives authority to modify the judgment when it is so permitted to stand in force.

4. It is unnecessary to inquire whether, after verdict and final judg-

ment on an issue *in form* involving the question of probable cause, as in this case, the court could certify the existence of probable cause.*

If *that part* of the issue were *immaterial*, the court could so certify; if *material*, it could not, for it would be *res judicata*. (Apollon case, 9 Wh., 367; U. S. *vs.* Riddle, 5 Cr., 311; The Friendship, 1 Gall., 111; Stacey *vs.* Emery, 97 U. S., 643; U. S. *vs.* Sherman, 98 U. S., 565; 2 Hiliard, Torts, 224, 4th ed.; Leglise *vs.* Champante, 2 Str., 820; Gelston *vs.* Hoyt, 13 Johns., 561; s. c., 3 Wh., 246; Fiedler *vs.* Maxwell, 3 Blatch. C. C., 552; Carrington *vs.* Merchants' Ins. Co., 8 Pet., 495; Wood *vs.* U. S., 16 *Id.*, 342; Clifton *vs.* U. S., 4 How., 242; U. S. *vs.* The Recorder, 2 Blatch. C. C., 119; Shattuck *vs.* Maley, 1 Wash. C. C., 245; The Malaga, 2 Am. L. J., 97; U. S. *vs.* One Sorrel Horse, 22 Vt., 655; The Palmyra, 12 Wh., 1; U. S. *vs.* The Reindeer, 14 Law Rep., 235.)

In Dunlap's Admiralty Practice, 267, it is said that "a seizure for a municipal forfeiture cannot be justified or excused upon the ground of probable cause, unless some statute creates and defines the exemption from damages." (Act March 2, 1799, ch. 22, sec. 71; act Feb. 24, 1807, ch. 19, 2 Stats., 422; act March 3, 1815, ch. 94, sec. 7; Charming Betsy, 2 Cr., 64; Shattuck *vs.* Maley, 1 Wash. C. C., 245; Burke *vs.* Trevitt, 1 Mason, C. C., 96; Gelston *vs.* Hoyt, 3 Wh., 314; The Apollon, 9 *Id.*, 362; The Palmyra, 12 *Id.*, 1; The Barossa, 1 Hagg. R., 75, n.)

Many cases define what is probable cause. (U. S. *vs.* Riddle, 5 Cr., 311; Locke *vs.* U. S., 7 *Id.*, 339; The George, 1 Mason, 24; The Fame Stewart, Ad. R., 115; The Friendship, 1 Gall., 111; U. S. *vs.* Gay, 2 *Id.*, 359.)

Dunlap says that the court, in deciding on the question of probable

* For the more recent cases against revenue officers, see Steamboat Co. *vs.* The Collector, 18 Wall., 478; Daudelet *vs.* Smith, *Id.*, 642; Pahlman *vs.* The Collector, 20 *Id.*, 189; Stockdale *vs.* The Insurance Companies, *Id.*, 323; Cary *vs.* The Savings Union, 22 *Id.*, 38; Bailey *vs.* Clark, *Id.*, 284; Bailey *vs.* Railroad Co., *Id.*, 604; Blake *vs.* National Banks, 23 *Id.*, 307; Slack *vs.* Tucker & Co., *Id.*, 321; Scholey *vs.* Rew, *Id.*, 331; Arthur *vs.* Cumming *et al.*, 91 U. S., 362; Pace *vs.* Burgess, 92 *Id.*, 372; Barney *vs.* Watson *et al.*, *Id.*, 449; Clapp *vs.* Mason, 94 *Id.*, 589; Erskine *vs.* Milwaukee, &c., *Id.*, 619; Railroad Co. *vs.* Rose, 95 *Id.*, 78; Bergdoll *vs.* Pollock, *Id.*, 357; U. S. *vs.* Gillis, *Id.*, 415; Arthur *vs.* Morrison, 96 *Id.*, 108; Arthur *vs.* Unkart, *Id.*, 118; Railroad Co. *vs.* Collector, *Id.*, 594; Arthur *vs.* Moller, 97 *Id.*, 365; Burgess *vs.* Salmon, *Id.*, 391; Stoll *vs.* Pepper, *Id.*, 438; Stacey *vs.* Emery, *Id.*, 642; Andrae *vs.* Redfield, 98 *Id.*, 225; Hartman *vs.* Bean, 99 *Id.*, 393; Arthur *vs.* Herold, 100 *Id.*, 75; Jones, administrator of Stockdale, *vs.* Blackwell, *Id.*, 599; Wills *vs.* Russell, *Id.*, 621; Improvement Company *vs.* Slack, *Id.*, 648; Arthur *vs.* Dodge, 101 *Id.*, 34; Wright *vs.* Blakeslee, *Id.*, 174; Greenleaf *vs.* Goodrich, *Id.*, 279; Powers *vs.* Conly, *Id.*, 789; Burke *vs.* Trevitt, 1 Mason, C. C., 96; Mayo's U. S. Fiscal Department, 432.

Injunction against revenue officers: High, *Inj.*, 360-366; Darling *vs.* Gunn, 50 Ill., 424; Haight *vs.* Day, 1 Johns. Ch. R., 18; Le Roy *vs.* New York, 4 *Id.*, 352; Attorney-General *vs.* Foundling Hospital, 4 Bro., 165; Mohawk *vs.* Clute, 4 Paige, 384; Bitter *vs.* Patch, 12 Cal., 298.

As to actions against officers: Receiver's case, 1 Lawrence, Compt. Dec., 367.

Among the cases as to "probable cause" are the following: 1 Cr., 1; 3 *Id.*, 458; 7 *Id.*, 339; 2 Wheat., 1, 18; 3 *Id.*, 78; 9 *Id.*, 362; 12 *Id.*, 1; 3 Pet., 318; 16 *Id.*, 342; 3 How., 197, 266; 4 *Id.*, 251; 13 *Id.*, 498.

cause, "would take into consideration no other facts than those which appeared at the trial of the cause." (Ad. Prac., 268; *The Fame*, Stewart, Ad. R., 112.)

No statute protects an internal-revenue officer from suit or judgment by reason of probable cause; but he is *protected from execution* when a certificate thereof is made in pursuance of section 989 of the Revised Statutes.

IV.—There can be in the present case, under section 3220 of the Revised Statutes, no payment of the judgment on this application.

1. It is a sufficient objection to its payment that the defendant in the judgment has not applied for it. Section 3220 provides for repayment to an officer who has paid a judgment recovered against him. It differs from section 989, which, on certificate of probable cause, prevents the issue of execution against the officer, and provides for payment of the judgment to the plaintiff.

It has been held by my immediate predecessor that absolute payment by the officer is not essential, in order to authorize him to apply for relief under section 3220. He is not required to do the vain or useless act of submitting to execution or making payment.

But the application for payment under this section must come *from him*. If he does not ask for relief, no party can do so on his behalf. If he is not so aggrieved as to desire and seek redress, the Government will not thrust relief on him. *Volenti non fit injuria*.

2. It is a sufficient objection also to payment under this section that it does not appear that the Attorney of the United States was notified or knew of the pendency of the suit.

Section 771 of the Revised Statutes makes it the duty of the attorney of the United States to appear and defend in "*all suits* * * * against collectors or other officers of the revenue." There can be no valid claim, since the only *evidence* of the merits of a right to a refund or repayment to the claimant is the record of the judgment. This *judgment* can give no such right, because it is *void* as against the Government. If it be assumed that the allowance of the Commissioner of Internal Revenue is *primâ facie* evidence of the right of the claimant to payment, yet this *primâ facie* right is overthrown as founded on "*mistake*," when it is shown that the *sole evidence* on which the claim rests is a nullity. *Ex nihilo, nihil fit*. This conclusion is strengthened by the fact that "the jury found Atkins was not liable, although the law (Rev. Stats., sec. 3148) distinctly declares that the collector shall be held responsible for every act done by the deputy in the performance of his official duty. This finding, unexplained, proves that the *trespass* was

not committed by Blocker while acting as deputy, but, as the declaration alleges, 'maliciously and without any reasonable and probable cause.'"

The claim is, in fact, *not* for a refund of taxes erroneously assessed, but for damages in tort for a *trespass*.

3. It might be urged with some force that the certificate of probable cause, required by section 989, is essential; that section 771, 989, and 3220, are parts of one system; that they are *in pari materia*; that they are to be construed together; hence that the certificate is required; (U. S. *vs.* Bowen, 100 U. S., 513; Audit case, 1 Lawrence, Compt. Dec., 35, 44, *n*; U. S. *vs.* Collier, 3 Blatch. C. C., 325; Black *vs.* Scott, 2 Brock., 325; Patterson *vs.* Winn, 11 Wheat., 385; The Harriet, 1 St., 251; U. S. *vs.* Hewes, Crabbe, 307; Dubois *vs.* McLean, 4 McL., 489;) and that the *general words* in section 989 apply to all judgments which fairly fall within them, pursuant to the maxim, *Generalis regula generaliter est intelligenda*.

Section 3220 is to be read in the light of its *history*. (Bender's case, 1 Lawrence, Compt. Dec., 331, 346; Blake *vs.* Nat. Banks, 23 Wall., 307.)

The origin of it is found in the act of March 3, 1863, section 12, (12 Stats., 741,) copied in part into the act of June 30, 1864, section 44, (13 Stats., 240,) and re-enacted in the act of July 13, 1866. (14 Stats., 111.)

It is evident that it originally contemplated repayment "*to collectors or deputy collectors*," against whom any judgment had been rendered, who had been compelled to pay the same. It authorized payment "by drafts drawn on collectors of internal revenue" by "the Commissioner of Internal Revenue."

The act of March 3, 1865, section 3, (13 Stats., 483,) took away this power to draw drafts or make payment, although the act of July 13, 1866, (14 Stats., 111,) in its words, reasserted the right to repayment, without the means of making it, by draft on the collector.

The Commissioner of Internal Revenue does not literally "repay" the judgment, as section 3220 would seem to direct; but he allows it *sub modo* as a claim, which, like all claims payable out of the Treasury, is to be audited, stated, and certified by the proper accounting officers. (Flack's case, 1 Lawrence, Compt. Dec., 186; Savings-Bank case, *Id.*, 194; Davis's case, *Id.*, 258.)

Heretofore it seems to have been the usage, upon *application of the internal-revenue officer* against whom a judgment had been rendered, to make payment in this manner, under section 3220, without requiring a

certificate of probable cause. The propriety of this non-requirement is not now presented for decision.

V.—There is no appropriation for the payment of the judgment. Congress seems to have made no appropriation for the payment of judgments for damages accruing from an illegal seizure and destruction of property.

Neither is there any authority to report it under the act of June 14, 1878, (20 Stats., 130,) to the Speaker of the House of Representatives for the consideration of Congress. Even, *arg. gr.*, conceding the judgment to be within sections 771, 989, or 3220 of the Revised Statutes, neither of these sections carries with it an appropriation for its payment. They are not under the title of "appropriations" in the Revised Statutes.

Section 3689 makes a "permanent annual appropriation" for "refunding [internal revenue] taxes illegally collected." (Act June 30, 1864, sec. 44, 13 Stats., 239, repealed by sec. 9, act June 13, 1866, 14 Stats., 111; see *Steamboat Co. vs. Collector*, 18 Wall., 490.)

Undoubtedly a judgment against an officer for the recovery of taxes illegally collected can be paid; at all events, the principal sum, if not costs, can be paid within two fiscal years; or, after that period, can be reported to the Speaker of the House of Representatives, under the act of June 14, 1878. (Police case, 1 Lawrence, Compt. Dec., 57; Arsenal case, *Id.*, 147; Ashton's case, *Id.*, 162; Keasbey's case, *Id.*, 172; Savings-Bank case, *Id.*, 194; Crocker's case, *Id.*, 297.)

Construing Title XLI of the Revised Statutes, including section 3689, according to the maxim, *Enumeratio unius est exclusio alterius*, it follows that the specification of appropriations therein contained operates as an exclusion therefrom of cases which are not specifically provided for in its defining or dictionary clauses. "It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions." (Denn *vs.* Reid, 10 Pet., 527; s. p., Ogden *vs.* Strong, 2 Paine, 584; U. S. *vs.* Irwin, 5 McL., 178; Jacob *vs.* U. S., 1 Brock., 520.)

The Constitution provides that no money shall be drawn from the Treasury but in consequence of appropriations made by law. The appropriation act must set forth the objects for which the appropriation is made, and no other objects can, properly, be brought within its provisions by the accounting officers.

It cannot be inferred from the general provisions of the internal-

revenue laws, nor from the provisions of section 9 of the act of July 13, 1866, (14 Stats., 111,) whence the permanent annual appropriation for refunding internal-revenue taxes erroneously collected was compiled, that the part of the section which authorized repayment of judgments for damages is still in force. To regard it as in force would be clearly erroneous; else why include in the permanent annual appropriations such items as "allowances and drawbacks," "refundng taxes," and "redemption of stamps," which might, under very broad construction, be swept under one general head of repayments or refunding? (*Ripley vs. Gifford*, 11 Ia., 367.)

There is no authority in this matter to go behind the Revised Statutes. In *United States vs. Bowen*, (100 U. S., 513,) it is said: "When the meaning is plain, [in the Revised Statutes,] the courts cannot look to the statutes which have been revised to see if Congress erred in that revision." In all such cases "the Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the 1st day of December, 1873." Applying these rules to the subject of permanent annual appropriations, in Title XLI, it is manifest that only the cases therein expressly provided for come under that head. It would be a violation of the rules of construction to include therein appropriations which were, before the revision, regarded as permanent. (See opinion of the Solicitor of the Treasury, January 19, 1875, House Ex. Doc. No. 27, 2d Sess. 45th Cong., January 11, 1878, page 186.)

The authority of Congress to control the expenditure of the public money should be scrupulously respected and obeyed. A latitudinarian construction of an appropriation is by no means allowable.

It is urged that judgments similar to this have been paid out of the permanent annual appropriation referred to. There have been a few such judgments so paid, but the particular question now raised may not have been then suggested. The instances referred to are not so frequent, nor of such long standing, as to constitute or establish a precedent. A change of practice will always be reluctantly made, and only after mature consideration. As to the necessity and propriety of the present construction, there is no room for doubt.

As there is not, and never was, any appropriation applicable to this claim, it cannot be reported to the Speaker of the House of Representatives under the act of June 14, 1878. (20 Stats., 130.)

It is not necessary to decide any question of limitation under sections 3226-3228; but, from what has been already said, it would seem that this claim is not within the limitations of these sections. It is not a

claim founded upon the wrongful assessment and collection of taxes or penalties, but a claim on a judgment in damages for injuries committed under color of office, wherein no moneys were exacted from the plaintiff and paid into the Treasury.

Nothing is due to the claimant.

TREASURY DEPARTMENT,

First Comptroller's Office, March 26, 1881.

After the rejection of this claim for the payment of the judgment of the circuit court, it appears that Dunnegan brought suit against the United States therefor in the Court of Claims, and that the court gave judgment that he "recover from the defendants the sum of \$833.70;" that is to say, the sum allowed by the Commissioner of Internal Revenue on the judgment of the circuit court.

The Court of Claims held that, so far as the United States was concerned, the judgment of the circuit court was invalid for want of notice to the proper Government officer.

"Believing [say the court] that opportunity to be heard should be a condition precedent to liability, we hold in this case that the Government, having had no notice, actual or constructive, of the proceedings in the court, is not concluded by its judgment."

* * * * *

"Hitherto, we have been considering the liability of the Government under section 989, growing out of the judgment and proceedings of the circuit court. When we come to consider it under section 3220, an entirely different question is presented. Here we encounter the decision of an intervening tribunal. The Commissioner of Internal Revenue, under the advice of the Secretary, has taken jurisdiction of the claim, and decided it in favor of the claimant. We are now to pass, not upon the court decision, except, perhaps, incidentally, but upon the decision of the Secretary and Commissioner. Here we can inquire only whether these officers had jurisdiction of the case, and whether their decision is free from fraud or mistake. (Kaufman's case, 11 Ct. Cls. R., 659; 96 U. S. Rep., 570 and 571. Real Estate Savings-Bank's case, 16 Ct. Cls. R., 335; Barnett's case, 16 Ct. Cls. R., 335. The last two cases cited have been affirmed on appeal, but not yet reported.)"

It was held by the Court of Claims that the claim is wholly within the provisions of section 3220 of the Revised Statutes; that, notwithstanding the adjudication of the case in the circuit court of the United States, neither the Secretary of the Treasury nor the Commissioner of Internal Revenue is bound by such adjudication; that it is fully in their discretion to allow or disallow payment; that with them the verdict of the jury and the certificate of the judge amount only to persuasive evidence; that they can go behind them both and inquire into

all the facts, circumstances, and allegations that may assist in coming to a correct conclusion; that they may refuse to allow the claim because no hearing was given to the Government in court, or they may waive that and consider its merits; and that with this unlimited power of review it cannot be said that the Government has not had a day in court.

COMMENTS BY THE COMPTROLLER.

The case was one within the proper jurisdiction of the circuit court, (Rev. Stats., 643;) and, admitting, *arg. gr.*, that it could be done, the statutes have not conferred on any executive officer the power to review the judgments of any United States or other court, in suits or proceedings within judicial cognizance. Section 3220 does give to the Commissioner of Internal Revenue authority to refund, in the manner provided by law, *taxes or penalties* erroneously or illegally assessed and collected, (1 Lawrence, Compt. Dec., 533-548;) but it confers no authority whatever upon him to allow claims for "*damages*," or "*costs*," on account of acts done by internal-revenue officers. The jurisdiction for the ascertainment of the facts and law in respect of such damages and costs is vested *solely in the courts*. (Rev. Stats., 3220; Railroad Co. *vs.* Barron, 5 Wall., 90.) In such case the judgment is subject to review in some appellate court only. Until such review is had, a valid judgment on regular proceedings creates a liability on the part of the United States which cannot be reviewed or modified in any respect by any executive officer. No part of the judicial power can be conferred on an executive officer. (Hayburn's case, 2 Dall., 409, notes; United States *vs.* Todd, 13 How., 52; Beatty *vs.* United States, Dev. Ct. Cls., 231.) The legislative, executive, and judicial departments "are co-ordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other; but all rightfully done by either, is binding upon the others." (Dodge *vs.* Woolsey, 18 How., 347.)

Neither the Secretary of the Treasury nor the Commissioner of Internal Revenue, nor the Auditor, nor the Comptroller, has any authority to examine on its merits and allow a claim for such damages as are provided for in section 3220. This is the necessary effect of its language. It declares that the Commissioner shall "repay * * * the full amount of such sums of money as may be recovered * * * in any court * * *; also all *damages and costs recovered*."

This section creates a liability on the part of the United States in cases in which section 643 confers jurisdiction on the circuit courts of the United States to adjudicate suits *against internal-revenue officers*,

for the recovery of damages on account of trespasses committed by them under color of office. No court has jurisdiction to adjudicate claims *against the United States* for damages, except the Court of Claims, and its jurisdiction is limited in this respect to actions *ex-contractu*. "No Government has ever held itself liable to individuals for misfeasance, laches, or unauthorized exercise of power by its officers and agents. * * * The language of the statutes which confer jurisdiction upon the Court of Claims excludes, by the strongest implication, demands against the Government founded on torts. The general principle which we have already stated as applicable to all Governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties." (Gibbons *vs.* United States, 8 Wall., 274, 275; Story on Agency, § 319; United States *vs.* Kirkpatrick, 9 Wheat., 720; Morgan *vs.* United States, 14 Wall., 531; Reybold *vs.* United States, 15 *Id.*, 202; Bank of Boston *vs.* United States, 10 Ct. Cls., 544.)

Congress never conferred on accounting officers, or on any other officers of the executive branch of the Government, authority to allow claims for damages on contracts sounding in *tort*. On the 7th of June, 1854, Attorney-General Cushing, in an elaborate opinion, held that the Comptrollers and the Auditors of the Treasury have no general authority to award damages as for tort on contract broken: their jurisdiction is confined to matters of *account* arising *ex-contractu*, or by operation of law. He shows that—

"An auditor is he who *audits*, and is defined to be a person appointed or authorized to *examine an account*, compare the charges with the vouchers, hear the parties, allow or reject charges, and state the balance. To audit is to examine and adjust an *account*. * * * There is exclusion of the idea of *damages*, the amount of which is not the result of computation merely, but involves other considerations, and, especially, the determination of indemnity for breach of contract *sounding in tort*, and depending on various premises of law and fact." (6 Op., 523; 2 Op., 457; 4 Op., 112, 327, 590; 5 Op., 28, 630; Opinion of July 2, 1832, ed. 1841, p. 882; 8 Op., 298.)

In view of this well-established principle of the exemption of the Government from liability for damages on account of the unlawful acts of its officers, it would take very clear language in a statute to confer jurisdiction upon executive officers in respect of claims for such damages. There are no words in section 3220 of the Revised Statutes which could, by any rule of interpretation or construction, be considered as authorizing the Commissioner of Internal Revenue, or the Secretary of the Treasury, to adjudicate a claim for damages resulting from the wrongful act

of an internal-revenue officer, much less to review the action of a court in respect of such a claim. Their jurisdiction in respect of such "damages" under that section, is purely ministerial; it relates solely to the payment of a judgment of a court. In this respect the accounting officers have the like jurisdiction—no more and no less. If the proceedings, as shown by the record, are valid, and there is an appropriation to pay the judgment, there is, then, a duty to pay it, irrespective of any executive opinion as to the merits of the adjudicated claim.

If, because of the want of notice to the district attorney, the judgment of the circuit court imposes no liability on the United States, neither the Commissioner of Internal Revenue, nor the Secretary of the Treasury, nor the accounting officers, nor the Court of Claims, have authority, in this case, to inquire as to damages sounding in tort, and declare the United States liable therefor.

The claim in this case rests either (1) on the *judgment* of the circuit court, or (2) on the *allowance* of damages in tort, and without any judgment as a basis for the allowance, by the Commissioner of Internal Revenue. If on the judgment, no liability against the United States exists, because of want of notice to the district attorney; if on an *allowance* by the Commissioner, as for damages, the allowance was made without authority or jurisdiction, and hence it is void. In either case there is no right on the part of the claimant to a payment by the accounting officers, or to a judgment in the Court of Claims.

IN THE MATTER OF THE AUTHORITY OF A DISTRICT COURT TO CORRECT AND REDUCE, BY CONSENT OF THE COMMISSIONER OF INTERNAL REVENUE. A JUDGMENT RECOVERED BY THE UNITED STATES.—SEAT'S CASE.

1. When a judgment is rendered by a court of competent jurisdiction in favor of the United States for a given sum of money, no officer of the Government can lawfully surrender the rights thereby vested, unless authorized to do so by statute.
2. A final judgment in favor of the United States on a distiller's bond, executed under section 3260 of the Revised Statutes, cannot, with the consent of the Commissioner of Internal Revenue and of the attorney of record of the United States, in the action in which the judgment was taken, be released or reduced in amount.
3. After the term at which such final judgment is rendered in a district court of the United States, the court cannot, with the consent of any officers, set aside or annul it, when there has been no motion filed to set it aside at the judgment term.

4. A judgment debtor, who makes a voluntary payment of the judgment, cannot recover from the United States the money so paid, unless authorized by Congress.
5. When money has been paid on the judgment, it cannot be refunded, under sections 3220 and 3689 of the Revised Statutes, as "taxes illegally collected."
6. The judgment is conclusive evidence that the tax was legally collected. No executive officer can collaterally impeach, or otherwise deny, the validity of the judgment, or the legality of the tax to enforce payment of which it has been rendered.
7. A voluntary bond to the United States for a lawful purpose, not prohibited by statute or public policy, is valid.
8. Under section 3260 of the Revised Statutes, a distiller may be required to give bond "on the first day of May of each" year—succeeding that in which his first bond is given. A bond may be conditioned only to run to the first day of May succeeding its execution; but if made indefinite in time it is valid accordingly.

In February, 1869, James T. Carter engaged in the business of distilling; first executing a bond, as required by section 7, act of July 20, 1868, (Rev. Stats., 3260,) with Christian Kropp and Thomas B. Harrison as sureties.* During the period from February, 1869, to February, 1870, inclusive, Carter defaulted in the payment of taxes due to the United States in the amount of \$628. April 11, 1874, suit was instituted on the distiller's bond in the district court of the United States at Nashville, Tennessee, for the recovery of this amount. On May 8, 1878, judgment was rendered in said court by Judge Trigg in favor of the United States for \$628 taxes, and \$540.08 interest thereon

*The bond sued on was, in substance, as follows:

UNITED STATES INTERNAL REVENUE.

Distiller's Bond.

[This bond must be executed by every distiller before commencing or continuing business under this act, and on the first day of May in each succeeding year.—Act July 20, 1868, sec. 7.]

Know all men by these presents, That we, James T. Carter, as principal, and Christian Kropp and Thomas B. Harrison, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five thousand dollars, money of the United States; to which payment, well and truly to be made, we, jointly and severally, bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 12th day of February, A. D. 1869.

The condition of the foregoing obligation is such, that whereas the said James T. Carter intends, on and after the 17th day of February, 1869, to be engaged in the business of a distiller within the sixth collection district of the State of Tennessee, to wit, in the vicinity of Clarksville, county of Montgomery, and State aforesaid:

Now, therefore, if the said James T. Carter shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business, then this obligation shall be void; otherwise it shall remain in full force.

JAMES T. CARTER. [SEAL.]
 CHRISTIAN KROPP. [SEAL.]
 THOMAS B. HARRISON. [SEAL.]

[Witnesses, &c.]

total, \$1,168.08. The principal on the bond (Carter) left for parts unknown, and Christian Kropp, one of the sureties, died after the commencement of the suit; whereupon the action was revived, and judgment was rendered against Samuel B. Seat, administrator of said Christian Kropp, who paid the amount thereof to the clerk of the court, and the latter turned it over to the collector of internal revenue on July 15, 1878. Thereafter said administrator, Seat, made application to the Commissioner of Internal Revenue for the refund of \$933.72 of the amount recovered from him, on the ground that the judgment was erroneous, in that under section 7, act of July 20, 1868, (15 Stats., 127; Rev. Stats., 2360,) the distiller was required to execute a new bond on the 1st of May of each year; that the bond upon which suit was brought was only liable for taxes from date of commencing business to April 30, 1869; and that the amount of taxes due for that period was, including interest, only \$234.36. The Commissioner rejected the claim, but instructed the United States attorney to have the judgment, if possible, so corrected as to relieve the said bond from all liability for taxes that became due after April 30, 1869, and to bring suit on a subsequent bond for the amount so released. The district attorney reported that no subsequent bond could be found.

At the October, 1880, term of the United States district court, held at Nashville, Tennessee, Judge Key presiding, a decree was entered, reciting that by the consent of the district attorney, acting with the consent and under the direction of the Commissioner of Internal Revenue, the judgment rendered against Samuel B. Seat, administrator of Christian Kropp, May 8, 1878, was erroneous, and is corrected and vacated to the extent of \$933.72.

A certified copy of the decree was, November 16, 1880, presented to the Commissioner of Internal Revenue, with an application of Samuel B. Seat, administrator, for refund of the \$933.72 so decreed.*

*The entry on the court journal is as follows:

"UNITED STATES OF AMERICA, }
Middle District of Tennessee. }

"At a district court of the United States, begun and held in the federal-court room in the city of Nashville on the 3d Monday, being the 18th day, of October, A. D. 1880.

"Present, the Hon. D. M. Key, Judge.

"The following proceedings were had, to wit:

"On the 26th day of October, 1880, a decree was entered in the words and figures following, to wit:

"THE UNITED STATES

vs.

S. B. SEAT, Administrator of Christian Kropp. }

"Came the parties by their attorneys, and it appears to the satisfaction of the court that, on the 8th day of May, 1878, in the district court of the United States for the

This claim was, March 14, 1881, allowed by the Commissioner of Internal Revenue, and subsequently approved by the Secretary of the Treasury; and an account for its payment was stated by the Fifth Auditor of the Treasury.

Upon the foregoing facts in the case, the questions arise whether the judgment upon which the claim is founded could, after full satisfaction, have been so corrected and vacated by the order of the district court; and whether the liability of the sureties extended beyond the 30th day of April following the date of the execution of the bond.

—

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The Commissioner of Internal Revenue was authorized to require the suit to be brought which resulted in the judgment in question. He may, under section 3215 of the Revised Statutes, to a certain extent give directions or make regulations as to the proceedings therein up to final judgment.

The Revised Statutes provide as follows:

"SEC. 3214. No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings: *Provided*, That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

The duty to collect a judgment, when once rendered, cannot be doubted.

No officer can waive, surrender, or dispose of the property of the United States, unless authorized to do so by statute. (*Andræ vs. Redfield*, 12 Blatch. C. C., 407; s. c., *nom. Andræ vs. Redfield*, 98 U. S., 225; *Supervisors vs. Briggs*, 2 Denio, 26; s. c., 2 Hill, 135; *Receiver's case*, 1 Lawrence, Compt. Dec., 362.)

The law makes specific provision as to the mode in which any part of a judgment may be released, in the following sections of the Revised Statutes:

"SEC. 3229. The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, *may compromise any civil or criminal case arising under the internal-revenue laws instead of com-*

Middle District of Tennessee, the United States recovered of Samuel B. Seat, administrator of Christian Kropp, the sum of eleven hundred and sixty-eight $\frac{88}{100}$ dollars, and costs of suit; and, it appearing to the court that there is error in said judgment to the extent of nine hundred and thirty-three $\frac{73}{100}$ dollars, the same is so corrected, and by consent of attorneys, the district attorney acting with the consent and under the direction of the Commissioner of Internal Revenue, the said judgment is corrected and vacated to the extent of \$933 $\frac{73}{100}$, so erroneously rendered, and the clerk of this court will furnish a certified copy of this decree to the defendant."

mencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise." (Act July 20, 1868, ch. 186, sec. 102, vol. 15, p. 166. See *Stow's case*, 5 Ct. Cls., 362.)

"SEC. 3469. Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws." (Act March 3, 1863, ch. 76, sec. 10, vol. 12, p. 740; *U. S. vs. George*, 6 Blatch. C. C., 406.)

It is clear, therefore, that neither the Commissioner of Internal Revenue nor the attorney of the United States, nor both together, had any power to *release the judgment*.

The Commissioner and district attorney did not claim any right, unaided and alone, to do so; but, *in form*, a portion of the judgment was attempted to be surrendered by the order of court, entered October 26, 1880.

This order was unauthorized and void, because made after the judgment term, and after full payment of the whole judgment.

The subject of compromise has been fully considered by the Attorney-General. (13 Op., 479; 15 Op., 259.)

It has already been decided that a judgment cannot be vacated or changed on mere motion made after the term at which it was rendered. (*Dunnegan's case*, *ante*, 87.)

If the Government had been represented by officers clothed with the powers of natural persons, as in cases between them, consent could not, after final judgment, give the court the authority or jurisdiction assumed in this case, because it was denied by the law. [*Dunnegan's case*, *ante*, 87; *Broom*, Leg. Max., 135; *Andrews vs. Elliott*, 6 E. & B., 388, (88 E. C. L. R.); *Tyerman vs. Smith*, *Id.*, 724; *Lawrence vs. Wilcock*, 11 A. & E., 941, (39 E. C. L. R.); *Vansittart vs. Taylor*, 4 E. & B., 912, (82 E. C. L. R.); *Scott vs. Sanford*, 19 How., 393; *Kelsey vs. Forsyth*, 21 *Id.*, 85; *Montgomery vs. Anderson*, *Id.*, 386; *Ballance vs. Forsyth*, *Id.*, 389; *Shelton vs. Tiffin*, 6 *Id.*, 164; *Bank vs. Moss*, *Id.*, 31; *Albers vs. Whit-*

ney, 1 Story, 310; *Brush vs. Robbins*, 3 McLean, 486; *Appleton vs. Smith*, 1 Dillon, 202; *Oliver vs. Andrews*, 6 Pet., 143.]

This is, therefore, not a case in which the maxim, *Concensus tollit errorem*, can apply, for there was no legal or authorized consent to vacate any part of the judgment. Neither the attorney of the United States nor the Commissioner of Internal Revenue was authorized, nor were both together authorized, to give such consent. The Government can only be bound by the acts of its agents when the acts are authorized.

There is the additional objection here, that the order to modify the judgment was made after its *full payment*.

Such payment forever estopped the debtor from objecting to the judgment or demanding a refund of the money paid. [*Marriott vs. Hampton*, 7 Term R., 269; *Broom, Leg. Max.*, 332; *Hamlet vs. Richardson*, 9 Bing., 644, (23 E. C. L. R.); *Canaan vs. Reynolds*, 5 E. & B., 301, (85 E. C. L. R.); *Duke vs. Collins*, 4 Ad. & El., 866, (31 E. C. L. R.); *Wilson vs. Ray*, 10 A. & E., 88, (51 E. C. L. R.); *Brown vs. McKinally*, 1 Esp., 279; *Milnes vs. Duncan*, 6 B. & C., 679, (13 E. C. L. R.); *Moses vs. Macfarlaine*, 2 Burr., 1009; *Phillips vs. Hunter*, 2 H. Bl., 414; *Brisbane vs. Dacres*, 5 Taunt., 160, (1 E. C. L. R.); *Preston vs. Peeke*, E. B. & E., 336, (96 E. C. L. R.); *Mortimer vs. South Wales*, R. C., 1 E. & E., 382, (102 E. C. L. R.); *Notman vs. Anchor*, 6 C. B., N. s., 536, (95 E. C. L. R.); *Kelly vs. Moray*, L. R., 1 C. P., 667; *Williams vs. Sitmouth*, L. R., 2 Ex., 284; 1 Y. & Coll., 589; *Craven vs. Smith*, L. R., 4 Ex., 149; *Irwin vs. Gray*, 19 C. B., N. s. 585, (115 E. C. L. R.); *A. G. vs. Dean*, 8 H. Lords Cas., 369; *Beamish vs. Beamish*, 9 *Id.*, 274.]

A party who is aggrieved by a judgment may have a writ of error, and thus ascertain whether there be error in it. If he have paid the judgment and it be reversed, he has a remedy.

In the English practice, when an execution is levied on a leasehold estate and the term thereof sold to a third person, the sale is good, though the judgment be revised; and the judgment debtor can only have the money which it sold for; but, if the term be delivered to the creditor himself at a certain value, the action is by *scire facias*. (*Hoe's case*, 5 Co., 91; 7 Mod., 154, 156; 11 *Id.*, 25; 1 Salk., 24; *Stickney vs. Atwood*, Mass. S. J. Court, June, 1784; *Bingham vs. Cabot*, *Id.*, Nov., 1794, Essex; 2 Saund., 101; Cro. El., 425, 459, 806; Farr. R., 154; Roll. Abr., 775, 776, 777; *Bird vs. Orms*, Cro. Jac., 289, 290; 2 Wils., 141; 3 *Id.*, 177; 2 Bac., 229; 3 Mass. R., 32; Hob., 6; 3 Cr., 492.)

For the American doctrine and practice on this subject, see Freeman on Judgments, chap. XXI. (Rev. Stats., 614, 633, 635, 691, 693, 702, 706, 709, 988, 997-1011, 1017; *South Fork Canal Co. vs. Gordon*,

2 Abb., U. S. C. & D. Rep., 479, 488; *Mayhee vs. Kellogg*, 24 Wend., 32; *Clark vs. Pimey*, 6 Cowen, 297; *Green vs. Stone*, 1 How. & John., Md., 405; *Isom vs. Johns*, 2 Munf., Va., 272; *Parker vs. Anderson*, 5 T. B. Monr., Ky., 455; 18 Ala., 405; 30 Cal., 458; 7 *Id.*, 443; 9 *Id.*, 16; 14 *Id.*, 667; 18 *Id.*, 275; 12 Barb., 67; 18 *Id.*, 578; 27 Ind., 83; 4 Wend., 95; 41 Mo., 416; 23 Ala., 296; 27 Ia., 239, 301; 8 Ohio, 120; 19 La. Ann., 69; 7 Rob., 386; 4 Abb. Pr., N. S., 53; 2 Ala., 325; 47 Ill., 433.)

Upon a reversal, unless a new judgment be recovered for the same cause of action, the judgment debtor who has paid, either voluntarily or otherwise, can recover back the money paid. In the present case, however, there has been no reversal.

Money voluntarily paid, even without judgment, cannot be recovered back. (Receiver's case, 1 Lawrence, Compt. Dec., 367; *Supervisors vs. Briggs*, 2 Denio, 26.)

The vacation of a portion of the judgment did not give a right to a restoration of the money paid. It did not in terms profess to do so. It could not produce any such legal result.

By payment, the title to the money vested in the United States. The money has been covered into the Treasury, and the title to it can only be divested by act of Congress, or by "due process of law." (Const., art. V., Amendments.)

The Government enjoys as full protection of its rights and property as private citizens. The right to protection does not exist by force of the Constitution merely, but by principles of the common law, imbedded in our system, which antedate the Constitution, and exist independently of it. (*Parham vs. Justices*, 9 Ga., 349; *Lawrence's Law of Claims against Governments*, House Rep. No. 134, 2d Sess. 43d Cong., 291.)

The claim now made is not placed upon the ground that a title to the money already paid has been revested in the claimant by the order of the court; but it rests upon the assumption that the payment was for a tax illegally collected.

The claim is made under provisions of the Revised Statutes, which are as follow:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or *illegally assessed or collected* * * *."

"SEC. 3689. There are appropriated * * * such sums as may be necessary * * * to *refund and pay back duties erroneously or illegally assessed or collected* under the internal-revenue laws."

There are two modes of collecting internal-revenue taxes—by the proper collector, in the accustomed way; and by suit, as in this case.

When, in an action, there is a judgment in favor of the United States for a sum, as in the case in hand, claimed as taxes legally due, this is the highest evidence that they *are* legally due.

Whenever a cause of action *transit in rem judicatam*, a final judgment is *pro eadem causâ* forever conclusive on all parties and privies: the rights determined by it can never again be lawfully called in question or disputed. In legal contemplation, such a judgment is so conclusive that its justness and morality are forever established beyond contradiction. It is *ultima ratio*; the *Ultima Thule* of the realm of litigation. It is reason and justice so firmly evidenced by record, that no "accusing spirit" can ever make complaint against it or demand that it be blotted out. It is "absolute verity." (R. *vs.* Carlile, 2 B. & Ad., 367; 1 Inst., 260; Reed *vs.* Jackson, 1 East, 355; Broom, Leg. Max., 334.)

For all the purposes now being considered, a final judgment converts fraud and force into virtue and peace. (De Medina *vs.* Grove, 10 Q. B., 152, 168; 59 E. C. L. R.) It is so potential that it makes vice, virtue; folly, wisdom; wrong, right.

To use the language of the civilians, *res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum*.

The finality of a judgment is not merely a matter of private concern; for, *interest reipublicæ ut sit finis litium*.

No executive officer has authority to call in question the point adjudicated in this case—namely, that *the tax was legally due*. (Supervisors *vs.* Briggs, 2 Hill, 135; s. c., 2 Denio, 26; Andrae *vs.* Redfield, 12 Blatch. C. C., 407; s. c., *nom.* Andrae *vs.* Redfield, 98 U. S., 225; Viser's case, 1 Lawrence, Compt. Dec., 75.)

The Government has fewer facilities for protection against unjust claims, or for ascertaining after a long period the merits of a judgment, than natural persons, who are *in propria personâ* vigilant of, and in situation to guard, their interests. Hence the Government, more than natural persons, needs the benefit of the maxim, *Nemo debet bis vexari pro una et eadem causâ*. (5 Rep., 61.)

No writ of error lies from judicial judgments to executive officers.

The judgment in this case is right without modification.

The Revised Statutes provide as follows:

"SEC. 3260. Every person intending to commence or to continue the business of a distiller shall, on filing with the collector his notice of such intention, and before proceeding with such business, and on the first day of May of each succeeding year, execute a bond in the form prescribed by the Commissioner of Internal Revenue, conditioned that he shall faithfully comply with all the provisions of law relating to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions; and

that he shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling-apparatus, to be incumbered by mortgage, judgment, or other lien, during the time in which he shall carry on said business. Said bond shall be with at least two sureties, approved by the collector of the district, and for a penal sum not less than double the amount of tax on the spirits that can be distilled in his distillery during a period of fifteen days. * * * A new bond shall be required in case of the death, insolvency, or removal of either of the sureties, and may be required in any other contingency at the discretion of the collector or Commissioner of Internal Revenue. Every person who fails or refuses to give the bond hereinbefore required, or to renew the same, * * * shall forfeit the distillery, distilling-apparatus, and all real estate and premises connected therewith, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years."

The ground upon which the judgment is claimed to have been erroneous is, that the bond, dated February 12, 1869, was only operative to May 1, 1869.

Undoubtedly, the collector might have required a new bond on the first day of May, 1869, unless, indeed, the words "first day of May of each *succeeding year*" would carry his authority over to the year 1870. It is equally clear that the bond in this case might have been conditioned for compliance with the revenue laws only *until May 1, 1869*.

The makers of it, however, did not choose to so limit their liability. The bond is in form indefinite as to time, and, since no other bond appears to have been given, it was so regarded by the parties thereto, and by the court which rendered judgment upon it.

As a *voluntary bond*, it is valid. (U. S. *vs.* Tingey, 5 Pet., 115; Farrar *vs.* U. S., 5 Pet., 373; U. S. *vs.* Bradley, 10 Pet., 343; U. S. *vs.* Garlinghouse, 4 Benedict's R., 194; U. S. *vs.* Mason, 2 Bond, 183; Osborn *vs.* U. S., 16 Int. Rev. Rec., 141; s. c., 4 Leg. Gaz., 343; U. S. *vs.* Hosmer, 17 Int. Rev. Rec., 38; Greathouse *vs.* Dunlap, 3 McLean, 303; U. S. *vs.* Brown, Gilp., 155; Dixon *vs.* U. S., 1 Brock., 178; *Id.*, 195; U. S. *vs.* Howell, 4 Wash. C. C., 620; U. S. *vs.* Maurice, 2 Brock., 96; 6 Op. Att.-Gen., 24; P. M. Gen. *vs.* Early, 12 Wheat., 136; Broome *vs.* U. S., 15 How., 143.)

It may well be questioned whether the makers of a bond, the principal in which he avails himself of its continuous provisions, are not estopped to deny their liability. (Sparks *vs.* Bank, 9 Am. Law Reg., x. s., 365; State *vs.* Daniel, 6 Jones, N. C. Law, 444; Placer Co. *vs.* Dickenson, 45 Cal., 12; Thompson *vs.* State, 37 Miss., 578; State *vs.* Berg, 50 Ind., 496; Harris *vs.* Babbitt, 4 Dill. C. C., 191.)

The provision authorizing the Commissioner to require a new bond may be considered as *directory*. The forfeiture declared in the last

clause of section 3260 is waived by the Government if not judicially prosecuted. This case is very different from that of the United States *vs. Smith*, 8 Wall., 587, and from that stated in the Attorney-General's opinion of April 5, 1877, (15 Op., 214.)

The result is, that the claimant has no valid claim. No balance can be certified in his favor.

The claim is rejected. There is no balance due on the Fifth Auditor's statement of the account.

TREASURY DEPARTMENT,

First Comptroller's Office, March 30, 1881.

**IN THE MATTER OF THE RIGHT OF A PRIVATE CHARITABLE INSTITUTION IN THE DISTRICT OF COLUMBIA, FOR WHICH CONGRESS APPROPRIATES MONEY, TO PURCHASE COAL AND WOOD WITHOUT INSPECTION.—
SISTER ELIZABETH'S CASE.**

1. The "fiscal" officer of a private charitable corporation, for the use of which Congress has made an appropriation, is required to render an account of expenditures, to be settled in the Department of the Treasury. (Rev. Stats., 236, 3623.)
2. The First Auditor of the Treasury has jurisdiction "to receive and examine *all* accounts" not by law specifically, or by reasonable inference, assigned to some other accounting officer, although they may not be mentioned in terms in the statutes prescribing his duties. Hence, he has jurisdiction of the accounts of the fiscal officers of private charitable corporations as to their disbursements of appropriations made by Congress.
3. The fiscal officer of such a corporation is not an *officer* of the United States; yet is, in some respects, an agent or *person* in the *service* of the Government. But coal and wood purchased by such fiscal officer for the use of a private charitable corporation are not, within section 3711 of the Revised Statutes, "for the public service." Hence, vouchers of payments made for purchases of such coal or wood do not require evidence of inspection under that section.
4. Section 3711 of the Revised Statutes requires coal or wood purchased for the use of benevolent institutions, supported and managed by officers or agents of the Government, to be inspected. Vouchers of payments made for such purchases cannot be allowed without evidence of inspection.
5. Inspectors, under section 3711, are to be appointed by the head of the Department for the service of which purchases are made. If the purchase is for a branch of the public service not under the control of a regular Department, (e. g., the "Government Printing Office" or the "Botanical Garden,") the chief officer of such branch appoints the inspector.
6. The fiscal officer of a private charitable corporation who wilfully fails to render accounts showing a lawful disbursement of the money appropriated by Congress may, on proper evidence, be punished as for embezzlement.

7. The term "Department," as generally used in statutes, does not include the "Government Printing Office," the "Botanical Garden," the "benevolent institutions," and similar independent establishments.
8. The bonds required of inspectors, under section 3711 of the Revised Statutes, should, as a matter of convenience, be filed in the Treasury Department.
9. The inspectors are not officers. Hence, evidence of their appointment should be required by accounting officers.
10. Form of bond prescribed for inspectors.
11. The Commissioners of the District of Columbia, in making purchases of coal and wood for the public service, are subject to the provisions of sections 3711, 3712, and 3713 of the Revised Statutes.

The facts sufficiently appear in the decision.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The Saint Ann's Infant Asylum, in the District of Columbia, was incorporated as a private charitable corporation by act of Congress of March 3, 1863. (12 Stats., 798.)

The act of March 3, 1879, "making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty, and for other purposes," appropriated "for Saint Ann's Infant Asylum, five thousand dollars." (20 Stats., 400; see act June 20, 1878, *Id.*, 208.)

The act of June 23, 1874, (18 Stats., 216,) requires this appropriation to "be placed to the credit of the proper fiscal officer of such * * * corporation."

The fiscal officer is required to show that the money has been properly expended, and for this purpose to render accounts, to "be settled and adjusted in the Department of the Treasury." (Rev. Stats., 193, 236, 309, 310, 3623, 3624, 3625, 3633, 5488-5494.)

The accounts are to be stated by the First Auditor.

Section 277 of the Revised Statutes, prescribing the jurisdiction of the First Auditor, does not, in terms or *specifically*, enumerate this class of accounts as among those to be received and examined by that officer; but he is held to be the proper auditor to receive and examine *all* accounts not specifically, or by reasonable inference, assigned to some other officer.

This results from the fact that *all* accounts are to be settled in the Department of the Treasury; that when this Department was first organized under the Constitution there was but one auditor, who examined all accounts; and by necessity, if not by necessary inference, he is invested with the jurisdiction stated. (Senate-Clerks' case, *an'e*, 66.)

Among the vouchers in the accounts rendered for the fourth quarter of the fiscal year 1880, by Sister Elizabeth (Relihan), the fiscal officer

of Saint Ann's Infant Asylum, are two, for coal and wood respectively, of \$110.50 and \$210; but there is no evidence that the wood or coal was "inspected and weighed or measured" by any person appointed under section 3711 of the Revised Statutes.

The First Comptroller has to decide whether these vouchers can be allowed.

The Revised Statutes contain these provisions:

"SEC. 3711. It shall not be lawful for any officer or person in the civil, military, or naval service of the United States in the District of Columbia to purchase anthracite or bituminous coal or wood for the public service except on condition that the same shall, before delivery, be inspected and weighed or measured by some competent person to be appointed by the head of the Department or chief of the branch of the service for which the purchase is made. * * *

"SEC. 3713. It shall not be lawful for any accounting officer to pass or allow to the credit of any disbursing officer in the District of Columbia any money paid by him for purchase of anthracite or bituminous coal or for wood, unless the voucher therefor is accompanied by a certificate of the proper inspector, weigher, and measurer that the quantity paid for has been determined by such officer."

The validity of the vouchers turns upon the question whether the coal purchased, as represented in the vouchers, was "for the public service." If so, the vouchers cannot be passed or allowed without the certificate of the proper inspector; otherwise, they may.

It is clear that the fiscal officer of this asylum is not an *officer* of the United States, (Butler's case, 1 Lawrence, Compt. Dec., 25; Providence-Hospital case, *Id.*, 79;) yet she is in some respects an agent or person in the service of the United States.

Coal and wood purchased for the use of such corporation are not "for the public service" within section 3711 of the Revised Statutes. The asylum is a private corporation. The Government has no share in appointing its officers or agents, nor in its management or control; nor any connection with its administration, except as the law requires the settlement of accounts of its expenditures under appropriations made by Congress. Its fiscal officer is not technically a disbursing officer or agent of the United States, and hence gives no bond to the United States. (Butler's case, 1 Lawrence, Compt. Dec., 25; Providence-Hospital case, *Id.*, 79.)

Section 3711 of the Revised Statutes only applies, by its own terms, to coal or wood purchased for a "branch of the [Government] service." This is clear, because the inspector (as that section requires) is to be "appointed by the head of the Department or chief of the branch of the service for which the purchase is made."

This private corporation is not charged with any Government ser-

vice. Sections 3711 and 3713 properly apply to asylums and institutions under the management and control of the Government, the officers and agents of which are appointed by the President, head of a Department, or otherwise, under the authority of an officer of the Government. (*Cox vs. U. S.*, 14 Ct. Cls., 512; Clerk's case, 1 Lawrence, Compt. Dec., 305.)

When a public charitable institution in the District of Columbia is not under the special direction of any one of the "Departments" of the Government, the "chief" officer of the institution necessarily appoints the inspector of fuel therefor. The term "Department" includes the seven Executive Departments. (Rev. Stats., 158; *U. S. vs. Bellew*, 2 Brock., 281; Const., art. II, sec. 2, cls. 1 and 2.)

In a more comprehensive and popular sense the word "Department" sometimes includes Congress, the legislative department; and the Courts, the judicial department. (Const., art. I, sec. 8, cl. 18.) It sometimes has a Territorial application, (*Parker vs. U. S.*, 1 Pet., 293;) but generally, when used in statutes, it applies technically and strictly only to the seven Executive Departments.

The term "Department" does not generally, in statutes, include the "Government Printing Office," whose chief officer is the "Public Printer," but not an officer of any "Department." (Rev. Stats., 3758; 19 Stats., 145, 146.) Benevolent institutions controlled by officers and agents of the Government, and supported by it, but not connected with or under the control of any Department, do not generally fall within the term "Department" as used in the statutes. The Government Printing Office is a "branch of the public service," whose "chief" officer appoints inspectors under section 3711. The "Botanical Garden" is not a "Department"—it is an independent "*branch* of the public service;" it *grew* up, and has continued to *flourish*, on annual appropriations. (Rev. Stats., 1826, 1827, 1832, 1833; 21 Stats., 215, 238, 272.)

If a fiscal officer of a private charitable corporation misappropriates money appropriated by Congress, he is amenable to the law, and the corporation is also civilly liable for his acts.

The Revised Statutes provide that "all * * * *persons* receiving public moneys shall render distinct accounts of the application thereof according to the appropriation under which the same may have been advanced to them." (Sec. 3623.)

It is true that under the act of June 23, 1874, (18 Stats., 216,) money appropriated for private charitable institutions is not "advanced" *directly* to the fiscal officers thereof, but it is, upon requisition,

"placed to the credit of" such officer on the books of the Treasurer of the United States, or of an assistant treasurer or designated depository.

It is paid out "on the checks of such fiscal officer." Practically, and in legal effect, the money *is advanced* to the fiscal officer.

Section 5491 of the Revised Statutes renders liable to punishment as for embezzlement "every officer or *agent* of the United States who, having received public money, * * * fails to render his accounts for the same as provided by law."

The fiscal officer of a private charitable institution may very properly be regarded as an *agent* of the United States in disbursing money of the Government, and rendering an account thereof. A person who is intrusted with the disbursement of public money, and to render an account to the Government, has all the essential qualities of an *agent*. Undoubtedly, a criminal statute is to be strictly construed, but not so strictly as to impute to Congress a neglect of duty to make provision for the punishment of faithless persons guilty of misappropriating public money, when statutory provisions, by every reasonable construction of language, and by their manifest purpose, are applicable to such persons. (See *Ex parte Randolph*, 2 Brock., 482.)

A fiscal officer guilty of misapplying funds is also, of course, personally liable in a proper civil action; whether to the corporation or to the United States it is not necessary now to decide.

The law does not in direct terms specify the form or declare what disposition shall be made of the bonds of inspectors under section 3711 of the Revised Statutes; but section 3713 makes it the duty of the accounting officers of the Treasury Department, before passing any voucher, to require "a certificate of the proper inspector * * * that the quantity paid for has been determined by such officer."

For this purpose, evidence of the appointment of the inspector should be produced. The law requires it. (Rev. Stats., 3712.) Mere evidence that a person was acting as such might not be quite satisfactory, since these inspectors are not *officers*. (U. S. *vs.* Germaine, 99 U. S., 508.) Hence no officer is bound, in legal contemplation, to know who are inspectors. The bond duly approved would be evidence of such appointment; but this is not the only evidence which can be received.

It would be desirable to have a bond filed with the First Comptroller, (Rev. Stats., 269,) the Second Comptroller, (*Id.*, 273,) the Commissioner of Customs, (*Id.*, 317,) or the Sixth Auditor, (*Id.*, 277, 3674,) as the same might relate to coal or wood, the payments for which are evidenced by vouchers to be passed by these officers, respectively. This, however, is not practicable, since each inspector is required to give only *one bond*,

and the same inspector may certify vouchers to be passed by more than one of the Comptrollers.

It would be a convenient practice for all officers taking bonds to which access may be necessary or desirable in the settlement of accounts, to file them in the Treasury Department, where they would be within reach of all the accounting officers.

The statute requires the bond to be given "to the satisfaction of the appointing officer." It is ascertained that very informal bonds have in some cases been accepted. For convenience, a form is hereto appended.*

The vouchers rendered by Sister Elizabeth (Relihan), as fiscal officer of Saint Ann's Infant Asylum, are allowed.

TREASURY DEPARTMENT,

First Comptroller's Office, April 2, 1881.

*The following is prescribed as a proper form of bond of an inspector, weigher, and measurer:

Know all men by these presents, That we, John Smith, of the District of Columbia, in the United States of America, as principal, and John Jones, of _____, and John Davis, of _____, as sureties, are held and firmly bound unto the United States of America in the sum of five thousand dollars, lawful money, to be paid to the said United States; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 28th day of March, in the year of our Lord one thousand eight hundred and eighty-one.

The condition of the foregoing obligation is such, that whereas the Secretary of the Treasury [or other officer as the case may be] has, pursuant to law, constituted and appointed the said John Smith, a competent person to inspect and weigh or measure anthracite and bituminous coal and wood purchased by any officer or person in the civil, military, or naval service of the United States, in the District of Columbia, for the public service, and before the same shall be delivered:

Now, therefore, if each ton of coal weighed by said John Smith shall consist of two thousand two hundred and forty pounds; and if each cord of wood to be so measured by him shall be of the standard measure of one hundred and twenty-eight cubic feet, and if said John Smith shall well and truly execute and discharge all the duties required of him by law by virtue of such appointment, then this obligation to be void and of no effect; otherwise, to remain in full force and virtue.

_____. [SEAL.]
_____. [SEAL.]
_____. [SEAL.]

[Seals must be of wax or wafer.]

Signed and sealed in presence of—

_____.

UNITED STATES OF AMERICA, }
District of Columbia, County and City of Washington, } ss:

I, _____, of _____, being duly sworn, depose and say that I am the surety of John Smith in the foregoing bond, and that I am worth the sum of _____ dollars over and above all just debts and liabilities for any cause whatever, to the best of my knowledge and belief.

Sworn to and subscribed before me, this _____ day of _____, A. D. 188—.

_____,
Notary Public.

I certify that the above-named sureties are personally well known to me, and that they are sufficient for the penalty thereof.

_____,
_____.

The following circular is appended for information:

Circular in relation to Bonds of Inspectors, Weighers, and Measurers of Coal and Wood in the District of Columbia.

TREASURY DEPARTMENT,
Washington, D. C., March 30, 1881.

The attention of all officers or persons in the District of Columbia, whose duty it is to purchase anthracite or bituminous coal, or wood, for the public service, and of all persons appointed as inspectors, weighers, and measurers of coal and wood purchased in said District for the public service, is called to the following provisions of law:

"SEC. 3711. It shall not be lawful for any officer or person in the civil, military, or naval service of the United States in the District of Columbia to purchase anthracite or bituminous coal or wood for the public service except on condition that the same shall, before delivery, be inspected and weighed or measured by some competent person, to be appointed by the head of the Department or chief of the branch of the service for which the purchase is made. The person so appointed shall, before entering upon the duty of inspector, weigher, and measurer, and to the satisfaction of the appointing officer, give bond, with not less than two sureties, in the penal sum of five thousand dollars, and with condition that each ton of coal weighed by him shall consist of two thousand two hundred and forty pounds, and that each cord of wood to be so measured shall be of the standard measure of one hundred and twenty-eight cubic feet. The inspector, weigher, and measurer so appointed shall be entitled to receive from the venders of fuel weighed and measured by him twenty cents for each ton of coal weighed, and nine cents for each cord of wood measured by him. Each load or parcel of wood or coal weighed and measured by him shall be accompanied by his certificate of the number of tons or pounds of coal and the number of cords or parts of cords of wood in each load or parcel.

"SEC. 3712. The proper accounting officer of the Treasury shall be furnished with a copy of the appointment of each inspector, weigher, and measurer appointed under the preceding section.

"SEC. 3713. It shall not be lawful for any accounting officer to pass or allow to the credit of any disbursing officer in the District of Columbia any money paid by him for purchase of anthracite or bituminous coal or for wood, unless the voucher therefor is accompanied by a certificate of the proper inspector, weigher, and measurer that the quantity paid for has been determined by such officer."

To enable the accounting officers to discharge their duties under these provisions of law, the bonds of such inspectors, weighers, and measurers, with a copy of the appointment of each, should be filed in the office of the First Comptroller in the Department of the Treasury.

These bonds should be approved by the head of the Department, or chief of the branch of the service, making the appointment.

WILLIAM LAWRENCE,
First Comptroller.

Approved:
WILLIAM WINDOM,
Secretary.

AS TO COAL AND WOOD FOR PRIVATE CITIZENS OF THE DISTRICT OF COLUMBIA, there is an act of Congress as follows:

"CHAP. 194. An act to authorize the Commissioners of the District of Columbia to make and enforce regulations relative to the sale of coal, and also building regulations.

"*Be it enacted, &c.,* That the Commissioners of the District of Columbia be, and they hereby are, authorized and directed to make and enforce such rules and regulations relative to the sale of coal in the District of Columbia as shall insure full weight to purchasers of coal; also, such building regulations for the said District as they may deem advisable.

"SEC. 2. That such rules and regulations, made as above provided, shall have the same force and effect within the District of Columbia as if enacted by Congress.

"Approved, June 14, 1878."

The "sundry civil" appropriation act of March 3, 1879, (20 Stats., 406,) appropriates, under the head of "District of Columbia," for expenses of "one inspector of fuel, at two dollars per day, six hundred and twenty-six dollars."

This act relates to coal purchased by private parties, including private corporations. It is in aid of the acts of the legislative assembly of the District of Columbia "creating certain offices," approved August 21, 1871; and "prescribing the duties of certain officers." &c., approved August 23, 1871. It does not modify or limit the application of sections 3711, 3712, and 3713 of the Revised Statutes. A modification is a qualified repeal—a repeal *pro tanto*—and is not favored in law.

The Commissioners of the District of Columbia, and all acting under them in the purchase of coal and wood "for the public service," are subject to these sections. They are officers or persons in the civil service of the United States. (Clerk's case. 1 Lawrence, Compt. Dec., 305.) Every reason for applying these sections to other officers applies to them.

IN THE MATTER OF THE AUTHORITY OF THE COMPTROLLER OF THE CURRENCY TO ALLOW AS AN OFF-SET, FROM DIVIDENDS DUE TO THE UNITED STATES, A CLAIM UPON THE GOVERNMENT BY THE RECEIVER OF A NATIONAL BANK.—RECEIVER'S CASE, (SECOND.)

1. The *Receiver's case* (1 Lawrence, Compt. Dec., 362) examined and reaffirmed.
2. When a debtor to the United States, in payment of his debt, draws his check on a national bank to the order of an assistant treasurer, and the check is paid without objection by the bank, and the money is placed in the Treasury of the United States, the Secretary of the Treasury has no power to declare that the money so paid shall be deemed or applied as a payment on an indebtedness of the bank to the United States.
3. Nor can such payment be so deemed or applied by order of the Secretary, even if the check was paid from the money of the bank without its authority.
4. The Secretary of the Treasury is not, under section 236 of the Revised Statutes, an accounting officer charged with the duty of settling and adjusting claims against the United States.
5. The Secretary of the Treasury is not by law charged with a duty to revise and *reverse* the allowance of claims, as made in favor of the United States by the Comptroller of the Currency, against an insolvent national bank in the hands of a receiver.
6. The Comptroller of the Currency cannot himself revoke or recall such allowance, nor a *dividend* declared in favor of a creditor of an insolvent bank, especially if made by his predecessor in office, and when rights have been fixed and remedies waived on the faith of such allowance.

In this case the material facts are stated in the decision.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

May 27, 1867, Hon. Charles Case was appointed receiver of the First National Bank of New Orleans, which had become insolvent.

One item of indebtedness of the bank, then, was \$208,360.56, proceeds of certain vessels sold by order of the district court of the United States, which had been deposited in the bank to await the result of

admiralty proceedings, in which judgments were subsequently rendered against the United States for \$188,075.47, which sum the Government paid the owners of the vessels, and by reason of which payment the Government became, by the right of subrogation, a creditor of the bank. The justice and validity of *this* claim of the United States against the bank has never been denied. The Comptroller of the Currency, March 8, 1872, admitted the claim in favor of the Government "as being subrogated to the rights of the ship-owners" whose vessels had been improperly seized.

The statute requires the Comptroller of the Currency to make a ratable dividend of the money paid over to him by the receiver of an insolvent bank "on all such claims as may *have been proved to his satisfaction*." (Rev. Stats., 5236.)

Dividends were declared by the Comptroller, May 27, 1871, 15 per cent.; December 22, 1871, 20 per cent.; April 28, 1874, 30 per cent.; October 31, 1879, 5 per cent.—in all, 70 per cent.; and these have been paid to all creditors; except that only 35 per cent. has been paid (March 8, 1872) to the United States upon said \$188,075.47, leaving in the Comptroller's hands, unpaid, 35 per cent., or \$65,826.40.

On July 23, 1880, the Comptroller of the Currency addressed to the Secretary of the Treasury a letter, alleging that "there is due to the bank from the Government \$94,000," transferred in May, 1867, from the bank to the office of the assistant treasurer of the United States; and he suggested that the amount due the United States as dividends—\$65,826.40—be allowed as an offset, and that Congress be asked to appropriate a sufficient amount to cover the deficiency.

This was referred, for his opinion, to the First Comptroller, by whom the Secretary of the Treasury was, in December, 1880, advised to direct the Comptroller of the Currency to cover into the Treasury the money due to the United States for dividends, viz.: \$65,826.40.

(Many other facts, and a full opinion of the First Comptroller on this subject, will be found reported in the Receiver's case, 1 Lawrence, Compt. Dec., 362.)

On January 20, 1881, the Secretary of the Treasury addressed to the Comptroller of the Currency a letter, in which he says: "Concurring in the opinion of the First Comptroller, I have to request that you deposit to the credit of the Treasurer of the United States the amount of the unpaid declared dividends, as recommended."

On March 10, 1881, the Comptroller of the Currency enclosed to the Secretary of the Treasury a letter, dated March 3, 1881, of twenty-seven printed pages.

The printed letter restates many of the facts stated in the *reported case* above referred to, which may be consulted, and which facts it is unnecessary here to repeat *in extenso*. Among them are these: Early in May, 1867, the Secretary of the Treasury sent special agents to New Orleans to investigate the affairs of said bank and of the office of the assistant treasurer of the United States in that city.

On May 13, 1867, it is alleged that "said special agents took possession of the bank;" that while investigating the office of the assistant treasurer they found a check dated February 15, 1867, drawn on the bank by Mr. Thomas P. May, at that time president of the bank, for \$80,000, to his own order, by him indorsed, never presented to or accepted by the bank, but, of course, the property of the assistant treasurer.

"Very soon after thus assuming control" of the bank the agents "took from the vault of said bank * * * \$94,000;" with it paid said check of \$80,000, and applied \$14,000 on another similar check of \$315,879.10, dated May 13, 1867. This \$94,000 was deposited to the credit of the United States with the assistant treasurer. It thus became money in the Treasury of the United States.

No claim was ever made that this \$94,000 should be refunded, until May 11, 1880, when the receiver presented an account to the Comptroller of the Currency claiming its repayment.

The Comptroller of the Currency, in his printed letter, says:

"The law makes it my duty to pay dividends only on such claims of whose validity and amount I am *satisfied*. Otherwise the claimants are required to go before a court of competent jurisdiction to adjudicate the matter. (Sec. 5236, Rev. Stats., U. S.)

"Now, I am not at all satisfied as to the exact amount due the Government as a creditor of the bank."

He submits, as his conclusions, that the situation results as follows:

"1. That neither check was or is a valid obligation of the bank, and neither constituted at any time a claim against the bank.

"2. That the Government has, therefore, been paid \$94,000 of the moneys of the bank, in advance of its becoming a claimant, on the \$188,075.47.

"3. That the bank has paid 70 per cent. of its indebtedness to other creditors and 85 per cent. of its indebtedness to the Government, making a present overpayment of \$28,173.58 in case the United States is a common creditor of the bank.

"4. In case the Government is a preferred creditor, then the bank owes it the sum of \$28,249.07, to pay the par of her claim."

In conclusion, he says:

"I trust * * * the Secretary will * * * consider and allow the credit demanded, [said \$94,000,] *as he is authorized to do by section 236, Revised Statutes*. No money is demanded from the Treasury, but

simply that *credit on the Government's demand on the bank*, which the bank is entitled to ask, and which it is my duty to have presented, or present myself, before paying out the funds I hold in trust for the whole body of creditors, in order that if the Government refuses to accede, the bank will be entitled, under the provisions of section 951 of the Revised Statutes, to ask for the credit herein demanded in any suit which it may become necessary for the Government to institute."

The printed letter of the Comptroller of the Currency is a learned, able, and exhaustive argument. As a duty, and out of deference to the views of that officer, who has rendered long and valuable services, and seeks to guard with fidelity the interests intrusted to him, his argument has been considered with much care. Some points discussed by him, as also in the reported case referred to, are by no means material to the question now presented.

Upon the facts presented, there is on deposit with the Treasurer, subject to the order of the Comptroller of the Currency, \$65,826.40, which sum would seem to be due to the United States as dividends declared on a *valid claim*, unless (1) the claim *can and should be adjudged by the Secretary of the Treasury as having been paid by the \$94,000 taken from the First National Bank of New Orleans and deposited with the assistant treasurer of the United States*; OR, (2) *the Secretary can now and should adjudge that the bank or the receiver has a valid claim against the United States to refund the \$94,000, which should be set off against or deemed payment of the \$65,826.40 dividends due the United States.*

I.—The Secretary cannot adjudge any part of the claim of the United States against the bank (\$188,075.47) as *having been paid* by the deposit with the assistant treasurer of the \$94,000.

1. Assuming that the Secretary has authority to judge, the evidence shows *conclusively* that the \$94,000 *was* taken in payment of *checks on the bank*, and *not* on the claim of \$188,075.47, which was not finally adjudicated in court, and did not exist in favor of the United States until *after* the \$94,000 was appropriated. The Secretary cannot declare as fact a matter which he knows is not so.

2. Neither the receiver nor the Comptroller of the Currency ever treated the \$94,000 as paid on the claim of \$188,075.47. Up to May 11, 1880, no claim was made for any refund of this \$94,000; which had been always until then treated by the receiver and Comptroller of the Currency as *properly applied*, else dividends could not have been declared and paid as they were.

3. No law has given the Secretary of the Treasury power to adjudge in the manner stated, nor in the matter, except to so execute the law

as to secure payment to the Treasury of money due the United States. (Rev. Stats., 161, 248, &c.; U. S. *vs.* Adams, 7 Wall., 463.)

II.—The Secretary cannot adjudge that the bank or the receiver has a valid claim against the United States to refund the \$94,000.

1. Assuming that the Secretary has power to judge, he cannot decide as requested, because, *on the evidence*, there is no valid claim. (Receiver's case, 1 Lawrence, Compt. Dec., 362.)

2. The claim is barred by the statute of limitations, which no executive officer has a right to waive. (*Id.*; 6 Op. Att.-Gen., 314.) The Secretary cannot consent to do what would be unlawful.

3. The immediate predecessor in office of the present Secretary of the Treasury approved the opinion of the First Comptroller in this case, and in the usual form directed the \$65,826.40 to be covered into the Treasury.

As the late Secretary did not ask the Comptroller to reconsider the case, it is now to be deemed *res adjudicata*. (2 Op. Att.-Gen., 8; 4 Op., 356; 5 Op., 125, 664; 10 Op., 259; 12 Op., 358, 388; 13 Op., 456; 15 Op., 315, 350, 423; U. S. *vs.* Bank of Metropolis, 15 Pet., 302; Wood's case, 1 Lawrence, Compt. Dec., 9; Police case, *Id.*, 70.)

4. No law has authorized the Secretary "to consider and *allow* the credit demanded." The Comptroller of the Currency alleges that the Secretary "is authorized to do [so] by section 236, Revised Statutes."

That section provides that—

"All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

The words "in the Department of the Treasury" do not mean *by the Secretary of the Treasury*.

Other sections of the statutes show who are the officers authorized to *settle* and *adjust* claims. (Rev. Stats., 269, 277.)

5. If the claim were to be *allowed* by the First Auditor, and certified by the First Comptroller, it could not be paid without an appropriation by Congress. The Secretary has no authority to apply money due to the Government, as the dividend of \$65,826.40 is, in paying claims.

The Comptroller of the Currency alleges that by law it is his duty "to pay dividends only on * * * claims" of whose validity and amount he is *satisfied*, and that he is "not at all *satisfied* as to the *exact amount* due the Government as a creditor of the bank."

The claim of the Government, \$188,075.47, was admitted as a valid

claim in 1872, if not some years sooner, by the *then* Comptroller of the Currency, (the immediate predecessor in office of the present Comptroller,) who, on March 8, 1872, paid thereon to the United States 35 per cent. as a dividend from the assets of the bank.

From May, 1867, until May, 1880, a period of thirteen years, neither the receiver of the bank, the two Comptrollers of the Currency in office during that time, the creditors of the bank, its stockholders or officers, nor any other person, have denied the justice or validity of the claim of the Government.

After all this, when the Government may perhaps have lost the evidence by which it could maintain its rights in this and other respects, it must be held that the Comptroller of the Currency now in office cannot revoke the allowance, made by his predecessor, of the claim of the Government; that the authority to allow it, having been exercised, is *functus officio*; and that all parties are estopped from denying the validity of the claim. (Fawcett *vs.* Laurie, 1 Drewry & Smale, 192; Bump's Bankruptcy, 240; *In re* Smith, 15 Nat. Bankruptcy Reg., 97; *In re* Irwin, 3 *Id.*, 580; *In re* Hoyt, *Id.*, 55; *In re* Miller, 1 N. Y. Leg. Obs., 180; Patton's case, 7 Ct. Cls., 363; Bank of Bethel *vs.* Pahquioque Bank, 14 Wall., 401; Morse on Banks and Banking, 134; Kennedy *vs.* Gibson, 8 Wall., 505; Casey *vs.* Galli, 94 U. S., 681; 2 Bouv. Inst., n1382; 1 Dougl., 407*a*; 2 Exch., 741; 1 M. & Gord., 689; Davis *vs.* Bank of England, 2 Bing., 393; Coles *vs.* Bank of England, 10 Ad. & Ell., 437, 449; 10 Beav., 491; 2 Camp., 343; 7 Mass. Rep., 319; Sug. Pow., 32; 1 Tucker's Com., lib. 1, ch. 8, p. 92; National Bank *vs.* Case, 99 U. S., 628; Cooley, Const. Lim., 622; Clark *vs.* Buchanan, 2 Minn., 346; 33 N. Y., 603; Elec. Coll. case, 1 Hughes, C. C., 588; Seeley *vs.* N. Y. Nat. Exchange Bank, 4 Abb. N. Y., 61; Wood's case, 1 Lawrence, Compt. Dec., 9; Police case, *Id.*, 70.)

The sum of \$65,826.40, the dividend due as stated, should be placed. to the credit of the Treasurer of the United States.

TREASURY DEPARTMENT,

First Comptroller's Office, April 4, 1881.

IN THE MATTER OF THE AUTHORITY FOR RENTING BUILDINGS FOR GOVERNMENT USE IN WASHINGTON WITHOUT AN APPROPRIATION THEREFOR IN TERMS BY CONGRESS. GEOLOGICAL-SURVEY CASE.

1. The act of June 22, 1874, (18 Stats., 133, 144,) prohibits the making of any contract for the rent of any building in Washington, not then in use by the Government, "until an appropriation therefor shall have been made in terms by Congress."
2. In the absence of a general restraining statute, the appropriation of money for a specified service carries generally with it an implied authority to rent the buildings necessary for that service. The act of June 22, 1874, operates as such restraining statute, and limits such authority as to buildings for Government purposes in Washington.
3. The acts of June 22, 1874, (18 Stats., 144;) of June 21, 1879, (21 Stats., 23, 28, 29;) and of June 16, 1880, (21 Stats., 259, 274,) so far as they legislate as to renting of buildings, and make appropriations for the payment of rent, afford an example for the proper application of the rule that statutes *in pari materiâ* are to be construed as if parts of one act, each one of which parts is, if its words will fairly permit, to have a purpose which does not defeat that of any other.
4. Application of the maxim, *Noscitur à sociis*.
5. Particular provisions of appropriation acts are not to be construed as general legislation, and especially not as running beyond the fiscal year for which appropriation is made, unless the purpose to give them that character be at least reasonably certain. If there be doubt, and the purpose of the words employed can be fairly satisfied by construing such provisions as intended to be in force only for the fiscal year for which appropriation is made, they should be so construed.

The question whether the Secretary of the Interior is authorized to rent buildings for the Geological-Survey office for the fiscal year ending June 30, 1881, which were not in use by the Government on the 22d of June, 1874, is submitted to the First Comptroller for his opinion.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

There is no law authorizing the Secretary of the Interior to rent buildings for the purpose of the Geological Survey; nor is there any appropriation applicable to pay such rent, unless the authority and appropriation therefor can be inferred or implied from the provisions of the acts making appropriations for the service of the Geological Survey.

The legislative, executive, and judicial appropriation act of June 21, 1879, (21 Stats., 28,) for the fiscal year ending June 30, 1880, after making sundry appropriations, provides as follows:

"And the Secretary of the Interior is hereby authorized to rent such buildings as may be necessary from time to time for the purpose of the

census, the total expenditure not to exceed twenty-five thousand dollars, to be paid from the amount authorized to be expended by section twenty of act of March third, eighteen hundred and seventy-nine, census act, [20 Stats., 473;] also to enable him to provide offices for the Geological Survey, and offices for additional accommodation of pension clerks, three thousand dollars."

The "sundry civil" appropriation act of June 16, 1880, (21 Stats., 274,) makes appropriations for the fiscal year ending June 30, 1881, including one as follows:

"For the expenses of the Geological Survey, and the classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain, to be expended under the direction of the Secretary of the Interior, one hundred and fifty thousand dollars."

The deficiency appropriation act of June 22, 1874, (18 Stats., 144,) after making sundry appropriations, provides that "* * * hereafter no contract shall be made for the rent of any building, or part of any building, in Washington, not now in use by the Government, to be used for the purposes of the Government until an appropriation therefor shall have been made in terms by Congress."

Congress has thus rendered it unlawful, by the prohibition in the act of June 22, 1874, thereafter to make any contract for the rent of any building, or part thereof, in Washington, not then in use by the Government, to be used for the purposes of the Government, "until an appropriation therefor shall have been made in *terms* by Congress." The act of June 16, 1880, makes an appropriation in terms sufficient, in the absence of any restraining law, to authorize the renting of buildings and payment therefor; and so does the subsequent appropriation act for the same purpose. (21 Stats., 451.) These acts, however, do not repeal the restraining provision as to contracts for rent of buildings in the prior act of June 22, 1874. Such repeal can arise only by implication, and it is a rule in the construction of statutes that repeals by implication are not favored. There is no language in the acts cited which can be construed to raise a necessary implication of the repeal or modification of the restraining provision in the act of 1874.

All the provisions cited are in some respects on the same subject; they are *in pari materiâ*; they are to be taken together, read, and construed, as if parts of one law. Each provision is, if its words will permit, to be so construed as to have a purpose which does not defeat that of the others. These are familiar principles. (Sedg. Stat. and Const. L., 209.) When, therefore, the appropriation for the Geological Survey is "to be expended under the direction of the Secretary of the Interior," his direction is subject to other laws which remained unrepealed. All appropriations are expended under the direction of offi-

cers of the Government, but such officers are not, on that account, released from all legal restraint in making the expenditures.

The act of June 21, 1879, gave authority to rent offices for the Geological Survey for the fiscal year 1880. It excepted from the operation of the prohibition in the act of June 22, 1874, contracts for the rent of buildings for use "from time to time" for the purpose of the census. It also excepted therefrom contracts for the rental of "offices for the Geological Survey;" not, however, contracts made "from time to time," but contracts for the service of the fiscal year 1880, only. The authority to rent "offices for the Geological Survey, and offices for additional accommodation of pension clerks," which is given by the act of 1879, is limited to the fiscal year 1880.

The act is to be interpreted in accordance with the maxim, *Noscitur à sociis*. The provision above quoted authorizes the Secretary of the Interior to rent buildings for the purpose of the census "*from time to time*." This shows that it applied to the then current year, and also to others thereafter. The words "from time to time" would have been unnecessary if they did not apply to subsequent years. But in the next clause, as to the Geological Survey and pension clerks, these words are omitted.

Congress could not have failed to see that the emphatic language of the act of 1874, requiring an appropriation *in terms* as the only sufficient authority for entering into contracts for the renting of additional buildings, was designed to be so imperative as to demand clear, if not emphatic, words to constitute an exception to its prohibition, or to operate as a repeal thereof.

No exception is made in the act of June 16, 1880, in respect to contracts for the rental of offices or buildings for the Geological Survey for the fiscal year 1881. It does not "in terms" make any appropriation for that object; hence there is no authority to enter into such a contract.

This conclusion is strengthened by the fact that all the acts cited are appropriation acts. Particular provisions in these acts are not to be construed as constituting general legislation, unless it be reasonably certain that the legislature so intended. If there be doubt, and the purpose of the words employed in the statute can be fairly satisfied by construing them as referring only to the appropriation for the fiscal year covered by the act, they should be so construed.

The question submitted for the Comptroller's opinion is answered in the negative.

TREASURY DEPARTMENT,

First Comptroller's Office, April 5, 1881.

**IN THE MATTER OF REQUESTING AN ADVANCE OF MONEY,
OUT OF THE APPROPRIATION FOR SWAMP LANDS, TO A
CLERK DETAILED TO MAKE INVESTIGATIONS THERE-
UNDER, UPON A BOND CONDITIONED FOR FAITHFUL
DISCHARGE OF DUTY AS SUCH INVESTIGATOR.—SWAMP-
LAND CASE.**

1. The appropriation of money for a stated purpose gives to the officer charged with the execution of the purpose implied authority to make, by special agents, any investigations necessary to a proper discharge of such duty.
2. The officer may pay to such agents, out of the appropriation, a reasonable compensation and the necessary expenses incurred by them.
3. A clerk in a Department may be assigned to make such investigation, and may be paid, out of the appropriation for the purpose to which the service is incident, his proper expenses; but no compensation other than his salary as clerk can be allowed to him.
4. No money can be advanced to him on a bond conditioned for the faithful discharge of his duties as an agent to make investigations.
5. The head of the Department may appoint as special disbursing agent the clerk detailed to make the investigation, who must in such event give bond as a disbursing agent before any money can be advanced to him; and after such advance, render an account of his disbursements, to be settled in the Treasury Department.

Under the act of Congress of March 2, 1855, (10 Stats., ch. 147, sec. 2, pp. 634, 635,) as extended by the act of March 3, 1857, (11 Stats., ch. 117, p. 251; Rev. Stats., 2482, 2483, 2484,) the States respectively are authorized to make proof before the Commissioner of the General Land Office that any of the lands purchased within such State from the United States by any person prior to March 2, 1855, were "swamp-lands," within the meaning of the act of September 28, 1850, (9 Stats., ch. 84, p. 519;) and therefore the purchase-money shall be paid over to the State wherein said lands are situate.*

The act of June 16, 1880, (21 Stats., 259, 273,) appropriates money, among other purposes—

"For the settlement of claims for swamp lands, and swamp land indemnity, fifteen thousand dollars."

To carry into effect the object of this appropriation, the Commissioner of the General Land Office detailed a clerk from his office in the Interior Department to proceed to Illinois for the purpose of making necessary investigations, and directed that the clerk be paid, *out of*

* For the regulations as to the proof required, *vide post*, 140.

this appropriation, \$100 per month, together with his actual and necessary expenses during the time so detailed.

The Secretary of the Interior made, April 5, 1880, requisition on the Secretary of the Treasury for an advance of \$400 out of said appropriation, to be disbursed by said clerk, described therein as an agent to make investigations under the acts above referred to. This agent presented a bond, executed with sureties, for the faithful discharge of his duties as such agent to make investigations.

The First Comptroller is called upon to determine whether the action taken was authorized, and whether said bond is sufficient to justify the advance of public money to such clerk as disbursing agent.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The act of June 16, 1880, (21 Stats., 273,) appropriating money "for the settlement of claims for swamp lands," gives, by implication, to the officers charged with the duty of executing the law authority to appoint an agent to make the requisite investigations, and to pay him reasonable compensation and expenses out of the appropriation. "It is a general principle of law, in the construction of all powers of this sort, that where the end is required the appropriate means are given." (U. S. *vs.* Bailey, 9 Pet., 255; *Inspectors' case*, 1 Lawrence, Compt. Dec., 201; *Bender's case*, *Id.*, 317; *Eveleth's case*, *ante*, 20; 4 Op. Att.-Gen., 248; Rev. Stats., 3681; 5 Stats., 533, sec. 25; *Minis vs. U. S.*, 15 Pet., 445.)

It is competent to assign a clerk in the Department of the Interior to make such investigations as that now under consideration. If it were *res integra*, it might well be questioned whether such an assignment would be warranted on a close construction of the laws; but the established practice has decided the question favorably to the existence of the authority here exercised. (Rev. Stats., 183; U. S. *vs.* McCall, Gilp., 571; *Neilson vs. Lagow*, 12 How., 107; U. S. *vs.* Jones, 18 How., 92; U. S. *vs.* Macdaniel, 7 Pet., 1; U. S. *vs.* Ripley, *Id.*, 18; U. S. *vs.* Fillebrown, *Id.*, 28; *Gratiot vs. U. S.*, 15 Pet., 336, 371; *Inspectors' case*, 1 Lawrence, Compt. Dec., 206; *Bender's case*, *Id.*, 317; *Eveleth's case*, *ante*, 20.)

A clerk in the Interior Department assigned to duty, as such special agent, cannot receive any compensation as such agent; but his reasonable and necessary expenses may be paid out of the appropriation made for the purpose to which the service is incident. He will, however, be entitled to his salary as a clerk while so engaged. (Rev. Stats., 170, 1763, 1764, 1765; 18 Stats., 109, sec. 3; *Herndon's case*, 1

Lawrence, Compt. Dec., 45; Bender's case, *Id.*, 317; Evans's case, *ante*, 1; Randolph's case, *ante*, 12; Eveleth's case, *ante*, 20.)

In a letter to the Secretary of War, September 21, 1843, Attorney-General Nelson discussed the question whether, under the act of August 26, 1842, (5 Stats., 533, sec. 25,) the Secretary of War had authority to appoint an agent or commissioner to make an investigation, and whether there must be a specific appropriation providing compensation for the services. The Attorney-General held (4 Op., 248) that the Executive Department, being charged with the duty of seeing that the laws are faithfully executed, has authority to appoint commissioners and agents to make investigations required by acts of Congress; but that it cannot pay them for their services except from an appropriation for that purpose, for the general terms of an appropriation law should always be interpreted in subordination to the limitations imposed by existing and qualifying enactments. Even if it be conceded that this opinion was correct on the facts presented, it does not follow that the compensation and expenses of a clerk acting as an agent in making investigations of the character directed by the Commissioner of the General Land Office cannot be paid until a specific appropriation has been made therefor.

Section 3681 of the Revised Statutes (act August 26, 1842, sec. 25; 5 Stats., 533) prohibits payment of "any account or charge whatever, growing out of, or in any way connected with, any commission or inquiry, except courts-martial or courts of inquiry in the military or naval service * * * until special appropriations shall have been made by law to pay such accounts and charges." There is an exception which is not material to the present case.

On September 19, 1843, the Secretary of War addressed a letter to the Attorney-General, in which the former said: "A citizen has preferred to this Department certain charges against persons engaged in trade among the Indian tribes which incidentally tend to implicate persons employed by the Government * * * in carrying on her relations and intercourse with those tribes. I deem these charges of so serious a character as to require an investigation * * * and render the appointment of a special agent or commissioner necessary." He then says the act of March 3, 1843, which "provides for the payment of the contingencies of the Indian Department, has heretofore been considered as covering any necessary expenses for similar exigencies."

It was upon this letter that the opinion of the Attorney-General was given. The agent now in question can be appointed if an investigation is indispensable or reasonably necessary. It should not be held, when such investigations are necessary to the proper execution of

the object, that Congress by a general appropriation act gives no incidental authority to appoint agents, and makes no provision for their payment unless such act or some other statute specially appropriates for it. The investigation proposed by the Secretary of War was not of the character of that now under consideration. It related to charges of a serious character against Government employés. The statute, in prohibiting payment of expenses growing out of "any commission or inquiry," shows that, but for the exception made, military and naval courts-martial and courts of inquiry would have been included. The word commission is one of equivocal meaning. It is used either to denote a trust or authority exercised, or the instrument by which the authority is exercised, or the persons by whom the trust or authority is exercised. (*The King vs. Dudman*, 4 Barn. & C., 854.) Upon the maxim, *Noscitur à sociis*, there would be some force in saying that the prohibition in the act of 1842 applied to commissions or similar bodies of inquiry in the civil service. Upon the same maxim the "inquiry" mentioned in the statute may be an alternative form of defining a commission, or, at least, of describing a similar body. It may be that the expenses of a single agent charged with the duties for the civil service similar in character to those of a court-martial would fall within the prohibition of the statute.

Even though the prohibition applied to an agent charged with the duty of investigating official misconduct, or delinquency of employés specifically authorized by law, it would be embarrassing and highly prejudicial to the public service to hold that the head of a Department charged with the duty of executing an appropriation act, and with clearly recognized implied powers and discretionary authority thereunder, could not pay out of such appropriation for the services of an agent sent to examine the character and progress of the work, and the skill of those charged with its performance. A denial of the right to pay for necessary services and expenses is practically a defeat of the power to make examinations. Section 3681 of the Revised Statutes should not be so construed as to effect such defeat. Its language is not so clear or imperative as to require it to be so construed. The maxim, *quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest*, lays down the principle applicable to the case of necessary investigations.

No public money can be advanced on the requisition; because the clerk was not appointed as, and the bond offered by him is not the bond of, a *disbursing agent*. (Rev. Stats., 3648; *Ex parte Randolph*, 2 Brock., 447; *U. S. vs. Smith*, 8 Wall., 587.) The Secretary of the Interior *may*,

however, appoint as special disbursing agent the clerk who has been detailed to make the investigation. In such case, the clerk must give bond as a disbursing agent before any public money can be advanced to him; and he will be required to render an account of the disbursements under such bond, to be settled in the Department of the Treasury. (Rev. Stats., 161, 176, 183, 236, 250, 3614, 3622, 3623, 3624; 6 Op. Att.-Gen., 24.)

A strict compliance with these requirements is important. The principle which they involve is applicable to all Departments and branches of the Government. To allow departures from it would tend to the establishment of precedents fraught with danger, and to a general relaxation of the strict practice which should govern all advances and disbursements of the public moneys.

The bond presented not being the bond of a disbursing agent, no money can be advanced on the aforesaid requisition of the Secretary of the Interior.

TREASURY DEPARTMENT,

First Comptroller's Office, April 6, 1881.

Rules and Regulations. (Ante, 136.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 12, 1878.

In order to dispose of the claims for indemnity provided for by the act of Congress approved March 2, 1855, entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," which act was extended by the act of March 3, 1857, (as revised, now sections 2482, 2483, and 2484 of the Revised Statutes of the United States,) the following rules and regulations in regard to the "due proof" to be made to the Commissioner of the General Land Office, under the second section of said first-mentioned act, (as revised, now section 2482, Revised Statutes of the United States,) in order to obtain the indemnity aforesaid, are adopted:

The governor, or other duly authorized officer or agent, of the State claiming indemnity, will be required to furnish this office with a list of the lands for which indemnity is claimed. As soon as practicable after the receipt of this list *an agent will be appointed* to make an examination in the field of each of the tracts therein described, and secure such reliable information as to the character thereof as can be obtained from personal examination and observation, and by inquiry of the owner or resident thereon, if any there be, and of persons residing in the vicinity having personal knowledge of the past and present character of the land. Upon the completion of this examination at least thirty days' notice will be given the State, or claimants under the State, of the time and place when and where testimony will be received touching the character of the lands described in the list filed in this office.

At the times and places thus fixed the agent of this office will attend for the purpose of examining witnesses and adopting such other measures as may be necessary to protect the interests of the Government.

The evidence offered by the State, or its agent, as to the character of the land, must be the testimony of at least two respectable and disinterested persons who have personal and exact knowledge of the condition of the land during a series of years extending to the date of the swamp grant, (September 28, 1850.)

Where the testimony of witnesses having a knowledge of the condition of the land at the date of the grant cannot be obtained, the evidence of at least two respectable and disinterested persons, who have a knowledge of the land during a series of years

extending as near to the date of the grant as possible, may be presented; but before presenting this secondary evidence the State agent should file his own affidavit setting forth fully and satisfactorily the reasons for the failure to present the testimony of the first-mentioned class of witnesses, and also setting forth that the witnesses whose testimony he offers have the best knowledge of the land extending nearest to September 28, 1850, of any that can be obtained.

The testimony of each witness should not only show that at the time when he first knew the land the greater part of each forty-acre tract, or other smallest legal subdivision, was swamp or overflowed within the meaning of the grant, but it must be full and explicit on the following points:

The cause of the swampy character or overflow, with the time of the year and the length of time such was the condition of the land, and how much or what proportion of the tract was thus rendered unfit for cultivation in its natural condition;

The nature and extent of the means necessary to reclaim the land;

The kinds of timber, plants, shrubs, grasses, &c., growing on the land, and whether or not plowing and the removal of timber or other natural growth would not have caused the land to become dry enough for cultivation without ditching, draining, or protection from overflow;

The names of water-courses, lakes, &c., on or near the land, with a description of the size of the same, and, where not on the tract, the direction and distance from it;

The general character of adjacent and surrounding lands;

The present condition of the land, and in case any changes have taken place within the knowledge of the witnesses the nature and cause of such changes, with a full description of such artificial means of reclamation as have had any effect on the character of the land, and all other facts known to the witnesses which may tend to show the true condition of the land.

The witnesses should be required to state facts, not opinions, and their testimony should be as full and complete as to every fact within their knowledge as if it were needed to establish the character of the land to the satisfaction of a judge or jury.

Ex parte affidavits will not be considered, and all testimony must be taken in the presence of the agent of this office.

Depositions may be taken before any officer authorized by law to administer oaths: provided, that if taken before an officer other than the clerk of a court of record having a seal, the official character of such officer shall be established by the certificate of the clerk of the proper court of record under the official seal thereof.

In all cases the disinterestedness of the witnesses must be established under oath, and the credibility of the witnesses must be certified to by the officer taking the depositions, or established by the oath of witnesses to whose credibility he certifies.

In cases where the agent of this office shall be satisfied, from the previous examination in the field, that any tract or tracts are of the character contemplated by the swamp grant, the testimony of two witnesses as above mentioned will be deemed sufficient proof; but in cases where said agent shall not be so satisfied from the previous examination in the field, he will take measures to secure such additional evidence as may be necessary to fully determine the character of the land, by obtaining the testimony of the owner or occupant of the land, or, if those persons have testified, other well-informed persons residing in the vicinity of the land, allowing the agent of the State full opportunity to cross-examine such witnesses should he desire to do so.

If the agent of this office shall be in doubt as to the amount of a particular tract which is swampy or overflowed, he will have a survey and plat made of the tract by a competent surveyor, in order that the exact amount of swampy or overflowed land in the tract may be shown.

After the testimony is taken the agent will make a full report to this office upon each of the tracts upon which testimony is taken, together with his opinion as to the real character of each of said tracts.

These regulations will supersede all former regulations; but cases where proof has heretofore been taken and filed in this office will be examined and determined upon such proof, if it is found to be in strict accordance with the regulations existing at the time of taking the same.

J. A. WILLIAMSON,
Commissioner.

DEPARTMENT OF THE INTERIOR,
August 20, 1878.

Approved:

A. BELL,
Acting Secretary.

IN THE MATTER OF THE AUTHORITY OF THE TREASURER
OF THE UNITED STATES TO ISSUE DUPLICATE OF DRAFT
WITHHELD BY FORMER ATTORNEY FROM PAYEE.—DI
CESNOLA'S CASE.

1. Disbursing officers, who are such merely, (not including the Treasurer of the United States,) pay dues from the Government either in *money* or by *checks*. The authority of the Treasurer, in the absence of express statutory provision, to issue, in proper cases and as a means of executing the duties of his office, duplicates of lost *drafts* in order to make payment of claims for which warrants have issued, is fully supported both by inference of law and by commercial usage.
2. The Government, in making payments, adopts many usages of business men and banking-houses; and the principles underlying and regulating such usages are recognized as applicable to governmental transactions, except in so far as they may be in conflict with public policy or the sovereignty of the national power, or as they are controlled by statutory enactments.
3. If a draft be lost or rendered inaccessible to the rightful owner without his fault, and especially if the loss or inaccessibility has been caused by an officer of the Treasury having charge of the direction, issuance, or delivery of the same, the duty, nevertheless, remains to *make payment* of the amount for which the draft was issued.
4. Executive officers, as agents of the Government, will, in proper cases, do that which, in similar circumstances, courts would compel private parties to do.
5. Section 3646 of the Revised Statutes simply regulates and limits an authority to issue duplicates of lost *checks*, which existed before there was any statutory provision on the subject. Similarly, as to *drafts* wrongfully withheld, *e. g.*, by former attorneys from the payees thereof, the authority also existed to issue duplicates, or to make payments without them.
6. Public policy puts all Government checks and drafts on the footing of paper not designed to circulate as currency or a medium of exchange, but to be considered as *overdue* after the earliest practicable period or date of presentment.
7. An indorsee of a Government check or draft payable to order is, if he does not receive it within a *reasonable* time after its date, chargeable with notice of all objections to its payment.
8. The drawer of a check or draft is released from liability only when delay in presenting it has resulted in loss to him.
9. A bond of indemnity, the form of which is prescribed by the Treasury Department, is required before a duplicate draft will be delivered; and evidence substantially as in applications for duplicates of lost Government bonds is also required.
10. The Treasurer *may*, where a draft is withheld by a former agent or attorney from the payee and the Treasurer, and thus rendered inaccessible, issue a duplicate draft, either for his own or the payee's *convenience*; or he may pay the money directly to the latter, taking a receipt therefor, indorsed on the warrant.

11. When there is no lien on the fund or money in the Treasury for the payment of a claim, there can be no lien on the draft issued for payment; and there can be no lien on the fund, because the *possession* necessary to support it is wanting.
12. The principle of public policy which ascribes impeccability to the Government, and exempts it from statutes of limitation, interest-statutes, suit, and the rules governing persons, applies to the instrumentalities by which the fiscal operations of the Government are carried on; and these cannot be embarrassed or impeded by the recognition of implied liens.
13. The right to hold a draft *indefinitely*, *e. g.*, as a means of compelling the payee to make compensation for services, cannot exist; because such retention of the draft would be in contravention of the letter, purpose, and policy of the law.
14. The Court of Claims is without power to adjudicate upon merely equitable rights; and, by analogy, the executive branch of the Government is without such power.
15. The Treasurer cannot be required to pay money in any other mode than that directed by law. The Government reserves a sovereign control over the money and all its incidents and instrumentalities until it is paid in such mode.
16. The Treasurer's duty is merely to pay, by draft or money, the amount specified in the warrant to the person named therein; and no notice of lien or equitable claim on the draft or money will be recognized by him.
17. No lien, in its technical sense, in favor of a claimant's attorney, can attach to money, drafts, or papers in the possession of the Government, because of the impracticability of making it available.
18. The courts have no authority to interpose any obstacle to the payment by the Treasury of a draft to the payee or his indorsee.
19. Consideration of the subject of limitation and absence of jurisdiction of the courts over executive powers and duties; and of attorney's lien in ordinary cases between individuals, and the means of enforcing it.
20. The lien of an attorney has grown up by the usage and practice of courts, in which only it can be enforced. Executive departments are not clothed with power to make it effectual, or to ascertain its extent, &c.; such power being judicial, not executive.
21. The judicial attributes of lien in favor of attorneys, arising from services in judicial proceedings, cannot spring from services relating to executive functions. An attorney who has possession of a Treasury draft has no technical lien thereon for services rendered in procuring it; and, as between the Government and the payee, he has no remedy either at law or in equity.
22. When a claim upon the United States is assigned conformably to the provisions of section 3477 of the Revised Statutes, the rights of the assignee, to the full extent of the assignment, will be recognized and protected by the Treasury Department.

A private act of Congress, approved March 2, 1881, "for the relief of Louis P. Di Cesnola, late consul at Cyprus," directs the Secretary of

the Treasury to pay him \$5,500, in reimbursement of the official expenses of his consulate. (House Reps., Nos. 202 and 279, 2d Sess. 46th Congress, February 11 and February 20, 1880.) On March 12, 1881, an account in favor of Di Cesnola was stated by the Fifth Auditor, and a balance certified by the First Comptroller, on which a warrant, No. 519, on the Treasurer of the United States, authorizing payment in favor of Di Cesnola, was issued. (Rev. Stats., 248.) On this warrant, for the purpose of making payment, the Treasurer issued a draft, as follows:

"Draft, } No. B. 5068. }	<i>On Diplomatic Warrant.</i>	} No. 519.
"TREASURY OF THE UNITED STATES, "Washington, D. C., March 12, 1881.		

"Pay to the order of Louis P. Di Cesnola, late consul, five thousand five hundred dollars.

"Registered March 12, 1881.

"W. P. TITCOMB,
"Assistant Register of the Treasury.

"To TREASURER U. S., } "\$5,500. Washington, D. C. }	"JAMES GILFILLAN, <i>"Treasurer of the United States."</i>
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The draft was delivered by the Treasurer to a party who claimed to be the agent and attorney of Di Cesnola, and authorized as such to receive it, and who now refuses to deliver it either to Di Cesnola or to the Treasurer of the United States. This party had been the attorney of Di Cesnola before a committee of Congress at a session previous to that at which the relief bill was passed; and a letter from Di Cesnola to him, on file in the office of the Fifth Auditor, referred to him as attorney in the matter pending in Congress. This letter was supposed by the Auditor to authorize the delivery of the draft by the Treasurer to the attorney, though it did not in terms so declare. There was no formal power of attorney. It seems that the attorney was employed and fully paid for his services so rendered, though he insists that his services were continued, and that other compensation is due. March 6, 1881, a letter was written, on behalf of Di Cesnola, to the First Comptroller, saying: "I am advised by General Di Cesnola, whose bill I championed, that some one makes claim on it. Whoever it is, don't allow anything to be done till the real beneficiary makes a new power of attorney or advises you."

This was by the proper clerk referred to the chief of the division of miscellaneous accounts in the First Comptroller's office, through which division all the papers would have passed, if the claim had been, as supposed, under the miscellaneous-appropriation act; but as it related

to the diplomatic service, it passed through another division, and so the direction given as to the delivery of the draft on the statement of the Fifth Auditor, was left unchanged and carried into the warrant.

On March 28, 1881, Di Cesnola applied to the Treasurer of the United States for the issue of a duplicate of the draft referred to, (Rev. Stats., 3646,) and the application is by that officer referred to the First Comptroller for decision as to the respective rights thereunder.

Nathaniel Wilson appeared for Di Cesnola and submitted an argument, an abstract of which is as follows: The party to whom the draft was delivered had no "letter of attorney," as required by Department circular No. 130, of October 10, 1876. He did not prosecute the claim *before the Department*. The circular only relates to attorneys in cases "adjudicated in this Department." He only had a letter in relation to the claim before Congress, addressed to him by Di Cesnola, giving no authority to receive a draft or to represent the latter in the Department. It is claimed that notice by letter was sent on behalf of Di Cesnola to the office of the First Comptroller directing that the draft should not be delivered to this party.

If he even has a claim for services, he can have no lien on the draft, because the draft was not delivered to him "with the express or implied assent of the party against whom it is asserted." (Story on Agency, sec. 361; Wharton, Agency, sec. 823; McPherson *vs.* Cox, 6 Otto, 404.)

The services rendered could not give a lien. (Trist *vs.* Child, 21 Wall, 441.)

The evidence also shows he has been paid in full.

Hon. *William Penn Clarke*, for the attorney holding the draft, made an argument and presented a brief maintaining that the attorney had a lien on the draft for services, and that the rights in controversy could be settled only by the courts, as the United States has no interest therein; that the application for a duplicate draft is without precedent and without warrant in law, since the original is not lost nor destroyed; that the issuance of the draft is payment in law, and the power of the Treasury officials is *functus officio*. (Rev. Stats., 305.) To issue another draft would be double payment. (Rev. Stats., 3646, 3647.)

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The First Comptroller is required to decide the questions involved in this case because, in the settlement of the accounts of the Treasurer of the United States, he must decide all questions affecting the validity of the vouchers produced by the Treasurer in evidence of payment of warrants. (Rev. Stats. 305, 311.)

The usual practice as to the delivery of drafts is this: If there be evidence on file of the authority of an attorney or other person to receive a draft, the Auditor, in his statement of the account, makes a memorandum thereon, importing that the draft is to be sent to the care of such attorney. A copy of the Auditor's statement accompanies the

warrant to the Treasurer, who delivers the draft according to the memorandum, taking the receipt of the attorney or agent therefor on the warrant.* This was done in the case of Di Cesnola.

If there be a contest between different attorneys as to the right to receive a draft, the matter is submitted to the Comptroller who certified the balance on which the warrant was issued, and he renders his decision thereon.

The mode of payment by drafts is fully authorized. (Rev. Stats., 300, 306, 307, 308, 3477, 3593, 3644, 3645, 3646, 3647, 4046, 4765, 5208, 5413, 5414, 5495, 5496; Draft case, 1 Lawrence, Compt. Dec., 11; Rhawn's case, *Id.*, 109; Moyer's case, *Id.*, 116.)

Dues from the Government are paid in various modes:

I.—Disbursing officers, who are such merely, (not including the Treasurer of the United States,) pay in *money* or by *checks*. (Rev. Stats., 3620, 3651; McKnight *vs.* U. S., 13 Ct. Cls., 204; Moyer's case, 1 Lawrence, Compt. Dec., 127.) Most of such officers are by law authorized to issue duplicates for checks not exceeding one thousand dollars each, after six months and within three years from the date of the loss of the originals. (Rev. Stats., 3646.) The mode of relief provided by the

* Upon this subject see the following circulars:

Delivery of Drafts to Claimants and Attorneys.

1880.
Department No. 62. }
Secretary's Office.

TREASURY DEPARTMENT,
Washington, D. C., July 10, 1880.

Hereafter the accounting officers will decide what persons as attorneys or claimants are entitled to receive drafts under the rules of the Department. This practice will prevent the delay occasioned by sending the papers to the Secretary or Assistant Secretary for such decision.

H. F. FRENCH,
Acting Secretary.

In relation to Powers of Attorney.

1876.
Department No. 130. }
Warrant Division No. 2.

TREASURY DEPARTMENT, October 10, 1876.

The order of the Department of April 16, 1875, relating to powers of attorney, is hereby revoked, and the following adopted in lieu thereof:

In every case to be finally adjudicated in this Department, the attorney shall present a letter of attorney from the claimant to prosecute the case, and shall be regarded as the attorney in such case, with the right to receive any draft therein. The claimant may change his attorney at any time, with the consent of the proper officers of the Department.

In cases certified for payment by the Court of Claims, or by any commission created by Congress, the persons certified by said court or commission as the attorneys of record shall be regarded as such by the Department, and be entitled to receive all drafts in such cases.

In all cases drafts for claims will be made to the order of the claimant, and will be delivered to the proper attorney, according to this order.

The Secretary reserves the right in all cases to make such special orders as may be proper.

LOT M. MORRILL,
Secretary.

statute must be deemed the only one authorized in case of the loss of such originals; and hence, in cases not within the statute, no duplicate checks can be issued by these officers. The maxim applies, *Expressio unius est exclusio alterius*. The act of April 19, 1871, (17 Stats., 4; Rev. Stats., 1770,) authorized the issuance of duplicates for lost checks in payment of pensions; but this authority was revoked by act of February 27, 1877, (19 Stats., 252.)

This general provision is not applicable to checks for the payment of interest on registered Government bonds. In one sense these are checks of a disbursing officer; but the Secretary of the Treasury, pursuant to his authority to execute the loan laws and make "regulations" thereunder, has provided for the issue of duplicates of lost interest-checks, "after forty-five days have elapsed from the date of the original." This regulation in terms applies only to the funded loan of 1891; but in practice it is applied to all the funded loans. (Rhawn's case, 1 Lawrence, Compt. Dec., 109; McKnight *vs.* U. S., 13 Ct. Cls., 305; s. c., 98 U. S., 179.) There is no express provision by statute for the issue of duplicates of drafts which, as in this case, are drawn by the Treasurer of the United States, pursuant to warrants drawn in favor of payees. The Treasurer's authority to issue such duplicates in proper cases, as a means of executing the duties of his office, is fully supported both by inference of law and by commercial usage. The Government, in making payments, necessarily adopts many usages of business-men and banking-houses; and the principles underlying and regulating such usages are recognized as applicable to governmental transactions, except in so far as they may be in conflict with public policy or the sovereignty of the national power, or as they are controlled by statutory enactments. (Richey's case, 1 Lawrence, Compt. Dec., 109, *n.*; Bank of the United States *vs.* U. S., 2 How., 711; McKnight *vs.* U. S., 98 U. S., 179; s. c., 13 Ct. Cls., 305, 306.)

The Treasurer is by law REQUIRED TO PAY parties named in warrants properly drawn on him. (Rev. Stats., 248, 305.) A draft for that purpose is not a *payment*—it is only a means of effecting payment; it is not money. (Draft case, 1 Lawrence, Compt. Dec., 21.) If a draft be lost or rendered inaccessible to the rightful owner without his fault, and especially if the loss or inaccessibility has been caused by an officer of the Treasury having charge of the direction, issuance, or delivery of the same, the duty nevertheless remains to *make payment*. Whatever is necessary to the performance of this duty is not merely an incidental power of the Treasurer, but a part of the authority expressly given him by law. (Rev. Stats., 248, 305; Inspectors' case, 1 Lawrence, Compt. Dec., 201; Bender's case, *Id.*, 317.)

When a check or draft is lost, the duty to give a duplicate, on proper evidence, at the proper time, upon sufficient indemnity being offered, is one which, as between private persons, courts will enforce. (2 Daniel, Neg. Inst., secs. 1164, 1474; Thomson on Bills, Wilson's ed., 204; Morse on Banks and Banking, 2d ed., 256, 370; Chitty, Bills, 13 Am. ed., [263] 299; 2 Parsons, Notes and Bills, 262, note *i*; Byles on Bills, Sharswood's ed., [366] 544; Edwards on Bills, 304; Rhodes *vs.* Morse, 14 Jur., 800; Taylor *vs.* Scrivens, 1 Beav., 571; Walmsley *vs.* Child, 1 Ves., sr., 346, 347; Leftley *vs.* Mills, 4 T. R., 170; 2 Camp., 215; Powell *vs.* Monnier, 1 Atk., 613; Johns *vs.* Mason, 9 Hare, 29; Penny *vs.* Penny, *Id.*, 39; Eccles *vs.* Cheyne, *Id.*, 215.) Neither the Government nor any of its officers can be sued in court for the purpose of requiring the issue of a duplicate draft. But executive officers, as agents of the Government, will, in proper cases, do without suit that which, in similar circumstances, courts would compel private parties to do. The Government is in theory impeccable, and should be so in practice. The fact that section 3646 of the Revised Statutes authorizes mere disbursing officers to issue duplicates of lost *checks*, cannot be a valid objection to the authority of the Treasurer to issue a duplicate of a lost, destroyed, or unavailable *draft*. The provisions in the case of checks are *authorizing* or *enabling* in their form. In *effect*, they simply regulate and limit an authority to issue duplicates which existed before there was any statutory provision on the subject. Similarly, as to *drafts* like that now in question, the authority also existed to issue duplicates, or to make payments without them. In the absence of such authority it would not be possible to perform properly the duties imposed by law on the Treasurer. It would be unreasonable to suppose that Congress, in providing for payments by means of drafts, intended to leave the Treasury Department without the power to discharge that duty efficiently.

If a draft be issued to a party, and by accident it be destroyed in the presence of, for example, the Secretary of the Treasury, is there no authority to make payment to the payee of that draft? Is the Treasurer, in the face of the statutory requirement to make payment, absolved from that duty by the circumstance of the draft being destroyed? The draft is not payment *per se*; it is only an order to make payment; and if it pass into the hands of a person having no claim on it, is the party who is entitled to payment without all remedy against such an accident? Is the payee of a draft without remedy in case of its loss? He might, it is true, apply to Congress for relief, which that body could grant; but if such application were his sole means of obtaining relief, the delay, inconvenience, and hardship to him would be very great,

and the probable expensiveness of the proceeding would in all cases impair, and often wholly destroy, the value to him of the draft as an order for payment. To restrict him to so dilatory a method of collecting an acknowledged debt would involve the gravest injustice to him, and a needless addition to the business of Congress; and to deny to the Treasury Department the power to afford proper relief in such cases, is to deny to it a power possessed by every corporation and private citizen in the liquidation of claims and debts. Any construction of the laws which would operate as a denial of such a proper and necessary power would, if applied to other laws under which it acts, often render the Treasury Department impotent to carry out some of the most important purposes of its existence.

If it be objected that the Treasury Department has not the requisite facilities for taking testimony in respect to such matters, it is sufficient to reply, that vastly more important and difficult questions are daily decided under its powers and agencies for the determination of the rights of claimants. No court can give relief in the case of a lost Treasury draft, for courts have no jurisdiction over the Government or its officers in such a matter.

In one sense the draft originally issued to Di Cesnola is not lost. If it were buried at a *known spot* in the bottom of New York harbor, it would not be literally lost; but if *inaccessible*, it would, for all practical purposes, be *lost*. (Edwards, Bills, 304, 306; 2 Daniel, Neg. Inst., sec. 1467.) The latter is the condition of the draft in question; the payee cannot obtain possession of it. It is not certain that replevin could reach it, even if such action would lie; and trover or other action might be unavailing. The draft is now so far lost that the Treasurer is fully authorized to make payment without its presentment, if the party holding it had no right to receive it; and it is decided, on the evidence submitted, that he had no such right. A draft payable to order, and not indorsed, may be lost by the payee, may come again into his possession after he has received payment on a duplicate, and be transferred by him to a *bonâ fide* indorsee. In such case the question may arise, *How long after date of the draft* may a party take it by indorsement and be regarded as a *bonâ fide* indorsee? In other words, at what period does the law charge an indorsee of a draft with notice of objections to its negotiation?

A duplicate draft should not be issued until such period has elapsed that an indorsee of the original would be chargeable in law with notice of objections to its payment; otherwise, the original might be indorsed to a *bonâ fide* holder having a right, on the principles of *lex mercatoria*,

to payment. If the duplicate were issued before such lapse of time, the Treasury would become liable to make double payment; and a refusal to pay the *bonâ fide* indorsee of the original draft would be a fraud upon him. The authorities are not agreed as to the length of time necessary to charge an indorsee with notice. It will depend largely on circumstances. In this respect there is a difference between *bills of exchange* and *checks*. A bill of exchange is designed for circulation; a check, for immediate payment. (2 Daniel, Neg. Inst., sec. 1595; Down *vs.* Halling, 4 Barn. & C., 333.)

A series of transfers of a check cannot prolong the liability of the drawer. (2 Daniel, Neg. Inst., sec. 1595; Story on Notes, secs. 495, 496; St. John *vs.* Homans, 8 Mo., 382; Foster *vs.* Paulk, 41 Me., 425; Reid *vs.* Reid, 11 Texas, 585; Lilley *vs.* Miller, 3 Nott & McC., 257; Brown *vs.* Lusk, 4 Yerg., 210; Taylor *vs.* Young, 3 Watts, 343; Harker *vs.* Anderson, 21 Wend., 372; Cruger *vs.* Armstrong, 3 Johns. Cas., 5.)

The name given to the order of the Treasurer for the payment of money in the case now under consideration is "draft," (Rev. Stats., 307, 3593, 3644;) that given the order drawn by other disbursing officers is "check." (Rev. Stats., 306, 3646, 3647.) Public policy puts all these checks and drafts on the footing of paper not designed to circulate, but to be considered as *overdue* after the earliest practicable period or date of presentment. This is so, *ex vi termini*, as to checks, and it is so, by statute, as to drafts.

The Revised Statutes provide as follows:

"SEC. 3645. It shall be the duty of the Secretary of the Treasury to issue and publish regulations* to enforce the speedy presentation of all Government drafts for payment, at the place where payable, and to prescribe the time, according to the different distances of the depositaries from the seat of Government, within which all drafts upon them, respectively, shall be presented for payment; and, in default of such presentation, to direct any other mode and place of payment which he may deem proper; but, in all these regulations and directions, it shall be his duty to guard, as far as may be, against those drafts being used or thrown into circulation as a paper currency or a medium of exchange."

Under this provision, in the absence of any regulation as to the time of presentment, and in conformity with the well-settled principles of the law of notice, it must be held that an indorsee of a Government check or draft payable to order is chargeable with notice of all objections to its payment if he does not receive it within a *reasonable time* after its date. What is a reasonable time depends, as already observed, on circumstances. A check or draft issued at Washington for a party at San Francisco will not be regarded as overdue until after it could

* For regulations issued under this provision, see *post*, 163, 164.

by due course of mail reach its destination, and be presented for payment in the ordinary course of business; but a draft issued and payable at Washington, intended, as in the case of Di Cesnola, for a payee in New York City, would be considered overdue in less time. In the present case, it is sufficient to say that the draft issued to Di Cesnola on the 12th of March may *now* be fairly considered overdue. A party who would now take it by indorsement would undoubtedly be chargeable with all objections to its payment, so far as any claim on the Government is concerned. This is clear upon the authorities. (Clark *vs.* National Metropolitan Bank, 2 MacArthur, Dist. Col. R., 249; Morse on Banks and Banking, 2d ed., 256, 260, 369; 2 Daniel, Neg. Inst., secs. 1572, 1588; 2 Parsons, Notes and Bills, 71, 106; Down *vs.* Halling, 4 Barn. & Cres., 330; Rothschild *vs.* Corney, 9 *Id.*, 389, 391; Ames *vs.* Meriam, 98 Mass., 294; Whistler *vs.* Forster, 14 C. B., N. S., 248; Ford *vs.* McClung, 5 W. Va., 156; Little *vs.* Phoenix Bank, 2 Hill, 429; Daniel *vs.* Kyle, 1 Kelly, 304; 5 Ga., 304; Harbeck *vs.* Craft, 4 Duer, 129; St. John *vs.* Homans, 8 Mo., 382; Conroy *vs.* Warren, 3 Johns. Cas., 259.)

The law of the place where a bank-check or draft is payable governs not only as to time, but as to the mode of presentment for payment. (Bowen *vs.* Newell, 5 Sandf., 326; s. c., 5 Duer, 584; 4 Seld., 190; 3 Kern., 290.) A bank-check payable ten days after date is an inland bill of exchange if payable in the State. (Bradley *vs.* Harrington, 5 Harr., Del., 305.) A check upon a bank is, until accepted, merely an order upon the bank. The latter is not liable upon it, and it may be revoked. (Schneider *vs.* Irving Bank, 1 Daly, 500; 30 How. Pr., 190. For the rule as to reasonable time, see Bank of Columbia *vs.* Lawrence, 1 Pet., 583; Bank of Alexandria *vs.* Swann, 9 Pet., 45, 46; Lenox *vs.* Roberts, 2 Wheat., 373; Hartford Bank *vs.* Stedman, 3 Conn., 489.) It has been said that "if the bank on which the check is drawn remains solvent * * * the drawer will remain bound after presentment and refusal of payment, although many months, or even years, have elapsed since the check was drawn." (2 Daniel, Neg. Inst., sec. 1589; Bell *vs.* Alexander, 21 Grat., 6; Emery *vs.* Hobson, 62 Me., 578; Byles on Bills, Sharswood's ed., 93, [20;] Stewart *vs.* Smith, 17 Ohio St., 86.)

The Government, the *drawee* of the draft to Di Cesnola, has not become insolvent, and it could not, on the ground of insolvency, claim exemption from liability. A party may draw a check to his own order, and on himself, and in such case he *never* can avoid liability on the ground that he has become insolvent since the check was drawn. A drawer of a check or draft is only released from liability when the delay

in presenting it has resulted in loss to him. Having the right to give a duplicate check in a proper case, the drawer would sustain a loss if the duplicate were paid, and he could nevertheless be held liable for the payment of the overdue *original* taken by an indorsee. But he would be exempt from liability for the payment of the overdue original, if the holder were guilty of *laches* in not making due presentment. If required to pay a second time, the negligence of the holder would result in loss to the drawer, who is guilty of *no laches*, and who "is entitled to such presentment * * * as will save him from loss." (2 Daniel, Neg. Inst., sec. 1587.)

A bond of indemnity to the United States* is required before a duplicate draft will be delivered; and the form of such bond is prescribed by the Department of the Treasury. (Moyer's case, 1 Lawrence, Compt. Dec., 131.) Evidence is also required substantially as in applications for duplicates of lost Government bonds.†

It is not necessary that a duplicate draft should be issued to Di Cesnola. The Treasurer *may* issue such duplicate, either for his own or Di Cesnola's *convenience*; or he may pay the money directly to the latter and require his receipt therefor indorsed on the warrant; which latter course may be advisable in this case. The statute provides that the Treasurer "shall take receipts for all *moneys* paid by him." (Rev. Stats., 305.) If payment in money be made directly to Di Cesnola, no court will be interrupted in its business with a profitless application for an injunction (for the granting of which there is no authority) to restrain the claimant from indorsing the draft or receiving payment thereof.

II.—Even though the attorney to whom the draft in favor of Di Cesnola was delivered have a claim against the latter for services, he has (1) no *lien* on the draft which will prevent the issue of a duplicate, and he can (2) in no way assert a claim against it.

(1.) As to the *lien*, it must be apparent that there can be no technical *lien* of an attorney or agent on such draft as that now in question which can prevent the issue of a duplicate, because it is, in effect, prohibited by law.

The Revised Statutes provide as follows:

"SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or *interest therein*, whether absolute or conditional, and *whatever may be the consideration therefor*, and all powers of attorney, orders, or other authorities for

*For a form proper to this case, see *post*, 164.

†As to bonds, see Rev. Stats., secs. 3702-3705; and "regulations" as to Government bonds, for which see 1 Lawrence, Compt. Dec., Appendix, p. 560.

receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

(As to the mode of taking acknowledgments, see section 1778.)

The Supreme Court has held that the words of this provision "embrace every claim against the United States, however arising, of whatever nature it may be, and wherever and whenever presented." (*U. S. vs. Gillis*, 95 U. S., 413; *Spofford vs. Kirk*, 97 U. S., 488; *McKnight vs. U. S.*, 98 U. S., 185; s. c., 13 Ct. Cls., 312; *Stow vs. U. S.*, 5 Ct. Cls., 362; *Taylor's case*, 11 Op. Att.-Gen., 520; *Assignment case*, 16 Op., 261; *Safford & Co.'s case*, 1 Lawrence, Compt. Dec., 287.)

One object of the statute is to prevent any delay or obstruction in the payment of claims to the original claimants, and another is to save executive officers from the necessity of deciding controverted questions of liens or assignments. Long before the enactment of this statute, it had been held by the Supreme Court (*U. S. vs. Robeson*, 9 Pet., 325.) that, in the absence of a law of Congress authorizing the assignment of claims on the United States, the Treasury Department could not give the assignment such a sanction as would vest in the assignee a legal right.

If it be said that "a lien is neither a *jus ad rem* nor a *jus in re*, but a simple right of retainer," (*Meany vs. Head*, 1 Mason, C. C., 319,) and hence no assignment of any part of the claim or fund, the answer is obvious, that a lien arises by contract, express or implied. In this case a lien is claimed to exist by implication from the contract of service. It may so arise as between attorney and client in cases not affecting the Government; but the *purpose* of the statute above quoted is to prevent all contracts, made prior to the issuing of a warrant, from diverting in any way the payment of money from the claimants. As no assignment can be made of a claim, or of the money allowed thereon, until *after* a warrant for payment issues, and then only by compliance with prescribed formalities, it is difficult to perceive, in view of the purpose of the statute, how any right to a lien on the draft can arise prior to the issuing of the warrant; and it is not pretended in this case that any right to a lien arose after its issue. "What cannot

be done directly from defect of power cannot be done indirectly." (Wayman *vs.* Southard, 10 Wheat., 50.)

If a lien gives a right in equity enforceable by foreclosure or other proceeding *in rem*, this would, in effect, be such an assignment of an interest as the statute in express terms prohibits. (Bristol's case, 11 Op. Att.-Gen., 7; Brooke's case, 12 Op., 216.)

(2.) If a lien may exist, with a right to hold a draft against the payee until a claim for fees be paid by him, such right "may be used as a defence to any action for the recovery of the property." (Story, Agency, sec. 371; 3 Chit. Com. and Manuf., 551; Meany *vs.* Head, 1 Mason, C. C., 319; The Ship Packet, 3 *Id.*, 334; Green *vs.* Farmer, 4 Burr., 2218; 2 Liv., Agency, 103, 104, ed. 1818; Paley, Agency, by Lloyd, 131; Scott *vs.* Franklin, 15 East, 428.) Litigation would involve delay in the payment of drafts, and might impede the operations of the Treasury.

Section 306 requires all moneys, against which drafts are drawn, to be covered into the Treasury, after the expiration of three years, "to the credit of the parties in whose favor such * * * drafts * * * were respectively issued or to the persons who are entitled to receive pay therefor." Section 308 provides that the payee, or any *bonâ fide* holder of such draft, on presenting it after such period of three years, shall be entitled to have it paid by the settlement of an account, and the issuing of a warrant in his favor, according to the practice in other cases of authorized and liquidated claims against the United States. (See also sections 307 and 3645.) The whole policy of these sections will be defeated if the ordinary incidents of a technical lien can be held to apply to a Treasury draft. It is evident that Congress never contemplated the attaching of a technical lien to any of the instrumentalities by which the business of the Government is transacted: it has, by necessary inference, excluded and exempted them therefrom.

The sections cited render null and void any agreement for the transfer or assignment of an interest in a claim, or in the fund for its payment, whether as security for compensation or otherwise, before the issuing of a warrant. The maxim may well apply, that no man ought to be permitted to allege his own misconduct or violation of law. (Davison *vs.* Franklin, 1 B. & Ad., 142; Flight *vs.* Salter, *Id.*, 673; 12 Op. Att.-Gen., 216.)

In Trist *vs.* Child, (21 Wall., 441,) it appears that Trist, having a claim against the United States, which the Executive Department had not recognized, made an agreement with Child whereby the latter was to prosecute it before Congress, and receive for his services twenty-five per cent. of any sum authorized to be paid by act of Congress. The

act of April 20, 1870, appropriated \$14,559 to pay the claim. Child demanded the stipulated compensation for his services, and Trist refused payment. The Treasury Department hereon suspended payment of the claim. Child filed a bill in equity, in the proper court in the District of Columbia, and a decree was made that Trist should pay Child \$3,639, and that he be enjoined from receiving, at the Treasury, any of the money appropriated until this sum was paid. On appeal in the Supreme Court of the United States, Mr. Justice Swayne, delivering the opinion of the court, said:

"The bill proceeds upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant upon the fund appropriated. * * * Was there, in any view of the case, a lien?

"It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. (*Yates vs. Groves*, 1 Vesey, jr., 280; *Lett vs. Morris*, 4 Simons, 607; *Bradley vs. Root*, 5 Paige, 632; 2 Story's Equity, sec. 1047.) A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. (*Field vs. The Mayor*, 2 Selden, 179.) But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor. (*Wright vs. Ellison*, 1 Wall., 16; *Hoyt vs. Story*, 3 Barb., 264; *Malcolm vs. Scott*, 3 Hare, 39; *Rogers vs. Hosack*, 18 Wend., 319.)

"Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between * * * Child and Trist was a personal agreement. It could in no wise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. (*Wright vs. Ellison*, 1 Wall., 16.) If there was no lien, there was no jurisdiction in equity.

"There is another consideration fatally adverse to the claim of a lien. The first section of the act of Congress of February 26, 1853, [Rev. Stats., 3477,] declares that all transfers of any part of any claim against the United States, 'or of any interest therein, whether absolute or conditional, shall be absolutely null and void, unless executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant therefor.' That the claim set up in the bill to a specific part of the money appropriated is within this statute is too clear to admit of doubt. It would be a waste of time to discuss the subject."

The bill was dismissed. (See *Stow's case*, 5 Ct. Cls., 362; *Carver's case*, 7 *Id.*, 499; *In re Paschal*, 10 Wall., 496.)

If there can be no lien on the *fund*—the money—it is difficult to perceive how there can be a lien on the draft drawn to pay a warrant

authorizing the payment of the money. The fund is the *principal* thing to be disposed of. The draft is a mere *incident*. (Draft case, 1 Lawrence, Compt. Dec., 21.) Its character cannot depart from that of the principal. If the principal be exempt from lien, so must the incident or agency to reach it. *Accesorium non ducit, sed sequitur suum principale*. (Co. Litt., 152 a.) A Treasury draft is an instrument which *may* be put into circulation. It is practically an equivalent of money, when accepted in liquidation of debts. It is, by such acceptance, transmuted into money; and it would circulate as money for an indefinite period did not the statutes and policy of the Government interpose a limit. While in circulation, a lien on the draft and a lien on the money would be one and the same thing. For purposes of payment or circulation, the draft is, in effect, money, equally with bank circulation. But so long as the draft does not come into the hands of the payee, as where it is lost or destroyed in transmission to him, or falls into the hands of a stranger who improperly detains it, it may be treated by the drawer as a nullity; and a lien on such a draft would be a lien upon nothing. There can be no lien upon moneys in the Treasury or in the hands of the disbursing officers of the Government. A bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account. (Morse, Banks and Banking, 42.) This includes a lien on any business paper or notes or bills belonging to the depositor which have been intrusted by him to the bank for collection. (*Ex parte* Pease, 1 Rose, 232.) But, with regard to such paper, there is something more than a lien in favor of the bank; there is an assignment to the bank itself; and the lien is on the fund accruing from such paper. Suppose the check left with the bank were not indorsed by a payee, could the latter be compelled to assign it? It might be a mere special deposit for safe custody; and on such deposits there is no lien. (*Ex parte* Eyre, 1 Phil. Eq. R., 235; *Brandao vs. Barnett*, 12 Cl. & F., 809; s. c., 6 M. & G., 630; *O'Connor vs. Majoribanks*, 4 Man. & G., 435; *Ex parte* Hustler, 3 Mad., 117; *Neponset Bank vs. Leland*, 5 Met., 259; *Washington Bank vs. Lewis*, 22 Pick., 24; *Bank of the Metropolis vs. N. E. Bank*, 1 How., 234; s. c., 6 *Id.*, 212; 17 Pet., 174; *Davis vs. Browshear*, 5 T. R., 488; *Scott vs. Franklin*, 15 East, 428; 1 Story, Contracts, sec. 181, ed. 1856; *Solomons vs. Bank of England*, 13 East, 135, *n. a.*; *Anon.*, 1 Salk., 126, Case 5; *Miller vs. Race*, 1 Burr., 452.) Neither will lien attach on securities left with the banker by *mistake* or casualty. (*Lucas vs. Dorian*, 7 Taunt., 279; *Wylde vs. Radford*, 33 L. J., ch. 51.)

If the lien in this case existed merely by possession of the draft and not on the fund itself, it would always be liable to be defeated; for,

as has been shown, the Treasurer may, according to his convenience, pay money on a warrant without the issue of a draft. He is not bound to issue a draft at all; and, therefore, a lien, dependent on the contingency of his voluntarily choosing to issue it, would be a mere shadow. It is the fund itself which constitutes the subject of a lien, if the latter could attach on it. If a lien existed, it could not, after proper notice, be defeated either by the issuance or non-issuance, or by the loss or destruction of the draft. There can be no lien on the fund, for the *possession* necessary to support a lien is wanting. Until the money is paid out of the Treasury it remains in the possession of the Government.

It is said in Tyler on Usury, (775:)

“It is a maxim of the common law, ‘that a lien never takes place without an express law to authorize it.’ And another rule, not less general, is, ‘that liens of every sort are regarded with a jealous eye, because they are prejudicial to third persons.’ It is for this reason that they are never implied. It is always necessary that there should be a formal obligation executed which produces a conventional lien, or an express law which creates a legal lien; otherwise there is no lien, nor can there be by construction or implication. Liens are *stricti juris*.”

The principle of public policy which ascribes impeccability to the Government, and exempts it from statutes of limitation, interest-statutes, suit, and the rules governing persons, applies to the instrumentalities by which the fiscal operations of the Government are carried on; and these cannot be embarrassed or impeded by the recognition of implied liens. (Richey's case, 1 Lawrence, Compt. Dec., 103.)

In this particular case there can be no lien, even if the attorney holding the draft has a valid claim for services; because it passed to his hands without the authority of the payee. Treasury Department circular No. 6, dated January 22, 1880, referring to drafts, says: “The only right of an attorney in such draft is a lien for his reasonable fees in the prosecution of the claim out of which it issues.” (Moyers' case, 1 Lawrence, Compt. Dec., 136.) This circular does not seem to have been approved by the First Comptroller, and it cannot change the statutes.

The right to hold a draft *indefinitely*—for example, as a means of compelling the payee to make compensation for services—cannot exist, because such retention of the draft would be in contravention of the letter, purpose, and policy of the law. (Rev. Stats., 306, 307, 308, 1778, 3477, 3645.) It has been shown that the issue of a duplicate draft, or else payment in money when the original draft has been lost, is a duty incumbent on the Government. There can be no obligation to withhold indefinitely the issue of a duplicate or the making of payment, in order to aid a party claiming a lien; because there is no

law which either gives the lien or commands the Treasurer to receive a notice of any claim in or concerning a Treasury draft other than that of the payee or indorsee. If there were such a law, it would embrace the equitable claims of all persons, and entail on the Government and its creditors endless litigation, with its train of trouble, delay, and expense. It was held by the Supreme Court, in *United States vs. Gillis*, (95 U. S., 412,) that the Court of Claims is without power to adjudicate upon merely equitable rights, (*Bonner vs. U. S.*, 9 Wall., 156;) and, by analogy, the executive branch of the Government is without such power. The Treasurer cannot be required to pay money in any other mode than that directed by law. The Government reserves a sovereign control over the money and all its incidents and instrumentalities until it is paid in such mode. (*U. S. vs. Morris*, 10 Wheat., 304.) The Government cannot, without its consent, be made a trustee. "Nothing is more untenable than the idea that * * * the Government assumes the character of a trustee; an idea so abhorrent to the principles of the common law, that to make the king a trustee was to make him absolute proprietor." (*Id.*, 303.) The Treasurer's duty is merely to pay, by draft or money, the amount specified in the warrant to the person named therein.

For these reasons, no notice of lien or equitable claim on a draft, or money to be paid out, will be recognized by the Treasurer. No lien, in its technical sense, in favor of an attorney for a claimant, can attach to money, drafts, or papers in the possession of the Government, because of the impracticability of making it available. There can be no right without a remedy: *Lex semper debet remedium; ubi jus, ibi remedium*. And *è converso*, where there is no remedy there can be no right. "Want of right and want of remedy are reciprocal." (*Broom*, Leg. Max., 191; *Ashby vs. White*, 2 Ld. Raym., 953; *Winsmore vs. Greenbank*, Willes, 577; *Vaugh. R.*, 47, 253.) The law neither does nor requires a vain or useless thing. Hence, a lien cannot exist if there be no means by which its holder can enforce it. The only means can be (1) to hold the instrument until the payee discharges the lien by satisfying the claim of the holder, or (2) by proceeding in courts; and neither course can avail with certainty in the case of a Treasury draft.

(1.) The holding of such a draft by an attorney, when it is delivered to him by authority of the payee, will not generally be interfered with, for reasons to be stated hereafter; but the draft may nevertheless become, by force of the statutes, unavailing to him as a security for his fee. (Rev. Stats., 306, 307, 308, 1778, 3477, 3645.)

(2.) There can be no remedy by judicial proceedings for a person claiming a lien on a Treasury draft, unless they are instituted by the Government. The latter *could* file a bill of interpleader and require parties to settle in court disputed questions as to the validity of the assignment of a draft, or as to the existence of a lien thereon, and, if existent, the amount requisite to discharge it. (*Vermilye vs. Adams Ex. Co.*, 21 Wall., 138.) But the expense, delay, and inconvenience which would attend the establishment of such a practice show its impolicy. There is no law authorizing or requiring it, and hence no lien-claimant has a right to demand a resort to such proceeding.

The courts have no authority to interpose any obstacle to the payment by the Treasury of a draft to the payee or his indorsee: because (1) the duty to pay is an executive function, independent of judicial action; (2) the United States cannot be made a party to suits in courts so as to have notice of their proceedings or be bound by their decrees; (3) no executive officer of the Government can be made a party for any such purpose; and (4) it is against sound policy to permit the exercise of any such jurisdiction. (Draft case, 1 Lawrence, Compt. Dec., 11; *Klink's case*, *Id.*, 242, 252; *Safford & Co.'s case*, *Id.*, 262; *Receiver's case*, *Id.*, 362.)

The subject of limitation and absence of jurisdiction of the courts over executive powers and duties has been discussed in the cases last cited, where it is shown that a draft cannot be attached; that neither the Government nor its officers can be garnisheed; that no remedy lies against them by injunction, (*Trist vs. Child*, 21 Wall., 441,) or the appointment of a receiver, or otherwise. In case of such a proceeding, what valid judgment or decree could a court render if a draft were attached? A judgment or decree that executive officers pay the draft cannot be made, because they cannot be made parties to the proceeding in court. Any order of court or judgment to such effect would be a mere *brutum fulmen*.

The lien of an attorney is enforced, in ordinary cases, *between individuals*, either by (1) summary *proceedings*, (2) defence to an action of trover, detinue, &c., or (3) relief in *equity*.

An attorney's lien attaches upon all papers of his client in the attorney's possession. The court will not compel an attorney to give up any writings in his possession unless the client agree to pay him his reasonable demands. (*Peterborough vs. Williams*, Comb., 43; *Wilkins vs. Carmichael*, 1 Doug., 104; *Welsh vs. Hole*, *Id.*, 239; *Dottin's case*, Str., 547; *Strong vs. Howe*, *Id.*, 621; *Ex parte Deeze*, 1 Atk., 228; *Stanhope vs. Roberts*, 2 Atk., 214; *Alger vs. Hefford*, 1 Taunt., 38; *O'Dea vs. O'Dea*, 1 Sch. & Lef., Irish Chan., 315; *Mitchell vs. Oldfield*, 4 T. R.,

.123; *Read vs. Dupper*, 6 *Id.*, 361, App. 35; *Randle vs. Fuller*, *Id.*, 456; *Dick vs. Milligan*, 2 *Ves.*, 25; *Newman vs. Payne*, *Id.*, 199; *Merryweather vs. Mellish*, 13 *Ves.*, 161; *Twort vs. Dayrell*, *Id.*, 195; *Taylor vs. Popham*, 15 *Ves.*, 72; *Broom's case*, 2 *Ves.*, sr., 25; *Griffin vs. Eyles*, 1 *H. Bl.*, 122; *Ormerod vs. Tate*, 1 *East*, 464; *Green vs. Farmer*, 4 *Burr.*, 2214; *s. c.*, 1 *W. Bl.*, 651; *Ex parte Bush*, 7 *Vin. Abr.*, 74; 2 *Peter. Abr.*, 65, "Attorney;" 12 *Id.*, 297, *n.*; *Montagu, Lien*, 63; *Whitaker, Lien*, 75; 2 *Bouv. Dic.*, "Lien;" *Carver's case*, 7 *Ct. Cls.*, 499; *Desmare's case*, 9 *Id.*, 1.) As a general rule, there is no remedy by sale, as in case of a pawn. (1 *Chit. Pract.*, 492; *Pothonier vs. Dawson*, *Holt's N. P.*, 383, *d*; *Tyler on Usury, Pawns, and Loans*, 568; *Leg vs. Evans*, 6 *Mees. & W.*, 42.)

As to lien generally, see 12 *Conn.*, 444; 8 *Fla.*, 183; 21 *N. H.*, 339; 27 *Id.*, 324; 37 *Id.*, 223; 43 *Id.*, 246; 3 *Caines*, 165; 10 *Wend.*, 617; 15 *Johns.*, 405; 1 *Cow.*, 172; 2 *Edw.*, 108; 2 *Vt.*, 162; 14 *Id.*, 247; 1 *Cal.*, 331; 2 *Id.*, 507; 26 *Ill.*, 218; 5 *La. Ann.*, 482; 8 *Id.*, 51; 11 *Id.*, 596.

As to summary proceedings and client's papers, see *In re Dakin*, 4 *Hill*, 42; *Ex parte Ketchum*, *Id.*, 564; 7 *Ct. Cls.*, 7; 9 *Id.*, 1.

There are liens arising, as between natural persons, from constructive trusts, which are enforceable only in courts of equity. (2 *Bouv. Dic.*, "Lien;" 2 *Story, Eq. Jur.*, sec. 1217; *Adams, Eq.*, 127; 1 *Parsons, Mar. Law*, 106; *In re Paschal*, 10 *Wall.*, 492.)

The relation existing between a person employed to prosecute a claim before Congress, or an executive department, and his employer is not that of attorney and client, as in court. The judge can punish an attorney for want of fidelity in a matter cognizable by the court, (*In re Paschal*, 10 *Wall.*, 483; *Barry vs. Whitney*, 3 *Sandf.*, 696;) but no court exercises supervisory jurisdiction over the conduct of an agent performing services before Congress or an executive department. Courts can, in some cases by summary proceedings, protect the rights of attorney; but neither Congress nor the executive departments can afford such protection by any proceeding having the force of an order or judgment of court. (*Hayburn's case*, 2 *Dall.*, 409.) The lien of an attorney has grown up by the usage and practice of courts, and it is by courts only that it can be enforced. It is a part of the stupendous work of judicial legislation. The executive departments are not clothed with the power to make liens effectual, or to ascertain the extent of a lien and order payment in discharge thereof, or to exercise other jurisdiction of like character. This power is judicial, not executive. The judicial attributes of lien in favor of attorneys, arising from services in judicial proceedings, cannot spring from services relating to executive functions.

It must, therefore, be held that an attorney who has possession of a Treasury draft has no technical lien thereon for services rendered in procuring it; and that, as between the Government and the payee, he has no remedy either at law or in equity.

III.—The RIGHTS of attorneys and agents who prosecute claims against the Government are not in any way impaired by the adherence of the Treasury Department to these principles. So far as it may have jurisdiction, and the exercise of such jurisdiction shall not be inconsistent with public policy and prudent administration, the Department will steadily recognize and protect those rights.

It is the *usage* of the Treasury Department, on the issue of a draft for the payment of a claim, to deliver it, on the written authority of the claimant, to the attorney named in that authority; and when so delivered no duplicate will, as a general rule, be issued, nor will payment be made other than of such draft. The attorney's right against the client, whether it be denominated a *lien* or otherwise, is not infringed by this usage; under which, the Department may safely leave the parties to their remedies in the courts. But where, as in this case, there is a contest as to the right of the attorney to receive the draft, or where the authority is revoked, or there is an improper delivery of the draft, or the evidence is insufficient or unsatisfactory as to the merits of the controversy, the safe and proper course on the part of the Treasurer will be to decline to deliver the draft to the attorney, and to deal with the claimant directly. In the event of the assignment of the claim in accordance with the provision applicable to such assignments in section 3477 of the Revised Statutes, the rights of the assignee, to the full extent of the assignment, will be recognized and protected. (*Carver's case*, 7 Ct. Cls., 499; *In re Paschal*, 10 Wall., 496; *Trist vs. Child*, 21 *Id.*, 441.)

Hereafter, in order to avoid controversies, to save expense to parties in interest, and to prevent injustice to the Government, a regulation *already existing* will be enforced, and the authority of an agent to receive a draft will, *ex abundanti cautela*, as a general rule, except "in cases certified for payment by the Court of Claims, or by a commission created by Congress," be required in the form of a power of attorney,* executed with the usual evidences of authentication required for powers to make indorsements of drafts, and giving such pertinent description of the draft, or the claim on which it is founded, as may be necessary to identify it. (*Rev. Stats.*, 1778, 3477; *Moyer's case*, 1 Lawrence, *Compt. Dec.*, 126; *Safford & Co.'s case*, *Id.*, 287, 293.)

*The form may be substantially as on page 165, *post*.

While it is no part of the duty of executive officers to attend to the collection of fees for services of attorneys, it is, at the same time, no part of their duty to afford facilities for defrauding them. Therefore, when it is clearly shown that a claimant designs to defraud his attorney, there is a discretion which may be exercised to pay claimants *in money* at the Treasury or a depository, upon notice of the time and place of payment given to the attorney, who, *after* such payment, can pursue any proper remedy authorized by law in favor of creditors. (Safford & Co.'s case, 1 Lawrence, Compt. Dec., 293.) Justice is advantageous both to attorney and client. (*Ex parte* Bryant, 1 Mad., 52; s. c., 1 Ves. & B., 211; *Green vs. Farmer*, 1 W. Black., 651; s. c., 4 Burr. 2214.) The Government should be so administered that attorneys will not be obliged to charge honest clients for the risk of loss from clients who are not so.

When a draft has been, as in this case, inadvertently delivered by the Treasurer to one as attorney who asserts a claim for services, he will generally be required to surrender it to the Treasurer, as a condition precedent to entitle him to notice of the time and place fixed for payment of the claim. If an attorney to whom a draft may have been delivered should, even under the authority of a power of attorney, hold it not merely until payment for services in relation thereto, but as security for advances of money, or otherwise vexatiously and in violation of law, a case might arise in which the Treasurer ought, either with or without the issue of a duplicate draft, to pay directly to the claimant. But when a draft is rightfully delivered to an attorney, who holds it only to secure the payment of reasonable fees, the claimant cannot ask the aid of the Treasury Department. Under similar circumstances, a court of equity would not aid a party refusing to do equity. "He who seeks equity must do equity."

The Treasurer of the United States will be notified either (1) to pay to Di Cesnola the amount of the warrant, and take on it his receipt therefor, which receipt will be a valid voucher in the settlement of the Treasurer's account; or (2) to issue a duplicate draft for the amount in favor of Louis P. Di Cesnola.

TREASURY DEPARTMENT,

First Comptroller's Office, April 8, 1881.

The only regulations prescribed (*ante*, 150) are as follow:

Circular instructions concerning the payment of Treasury Drafts and Official Checks of public Disbursing Officers.

1877.
Department No. 27. }
Ind. Treasury Div. No. 28. }

TREASURY DEPARTMENT,
Washington, D. C., February 13, 1877.

The following sections of the Revised Statutes of the United States and the subsequent regulations are published for the information and guidance of all concerned:

"SECTION 306. At the termination of each fiscal year all amounts of moneys that are represented by certificates, drafts, or checks, issued by the Treasurer, or by any disbursing officer of any Department of the Government, upon the Treasurer or any assistant treasurer, or designated depository of the United States, or upon any national bank designated as a depository of the United States, and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for three years or more remained outstanding, unsatisfied, and unpaid, shall be deposited by the Treasurer, to be covered into the Treasury by warrant, and to be carried to the credit of the parties in whose favor such certificates, drafts, or checks were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated 'outstanding liabilities.'"

"SECTION 308. The payee or the bona-fide holder of any draft or check the amount of which has been deposited and covered into the Treasury pursuant to the preceding sections, shall, on presenting the same to the proper officer of the Treasury, be entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor, according to the practice in other cases of authorized and liquidated claims against the United States.

"SECTION 309. The amounts, except such as are provided for in section three hundred and six, of the accounts of every kind of disbursing officer, which shall have remained unchanged, or which shall not have been increased by any new deposit thereto, nor decreased by drafts drawn thereon, for the space of three years, shall in like manner be covered into the Treasury, to the proper appropriation to which they belong; and the amounts thereof shall, on the certificate of the Treasurer that such amount has been deposited in the Treasury, be credited by the proper accounting officer of the Department of the Treasury on the books of the Department, to the officer in whose name it had stood on the books of any agency of the Treasury, if it appears that he is entitled to such credit.

"SECTION 310. The Treasurer, each assistant treasurer, and each designated depository of the United States, and the cashier of each of the national banks designated as such depositories, shall, at the close of business on every thirtieth day of June, report to the Secretary of the Treasury the condition of every account standing, as in the preceding section specified, on the books of their respective offices, stating the name of each depositor, with his official designation, the total amount remaining on deposit to his credit, and the dates, respectively, of the last credit and the last debit made to each account. And each disbursing officer shall make a like return of all checks issued by him, and which may then have been outstanding and unpaid for three years and more, stating fully in such report the name of the payee, for what purpose each check was given, the office on which drawn, the number of the voucher received therefor, the date, number, and amount for which it was drawn, and, when known, the residence of the payee."

REGULATIONS.

(1.) Hereafter any Treasury draft or any check drawn by a public disbursing officer still in service, which shall be presented for payment before it shall have been issued three full fiscal years, will be paid in the usual manner by the officer or bank on which it is drawn, and from funds to the credit of the drawer. Thus, any such draft or check issued on or after July 1, 1873, will be paid as above stated until June 30, 1877; and the same rule will apply for subsequent years.

Any such draft or check which has been issued for a longer period than three full fiscal years will be paid only by the settlement of an account in this Department, as provided in section 308 above published; and for this purpose the draft or check will be transmitted to the Secretary of the Treasury for the necessary action.

(2.) The reports of Independent-Treasury officers, national-bank depositories, and public disbursing officers, required by section 310 above published, will be rendered promptly to the Secretary of the Treasury at the close of each fiscal year.

(3.) Whenever any disbursing officer of the United States shall cease to act in that capacity, he will at once inform the Secretary of the Treasury whether he has any

public funds to his credit in any office or bank, and, if so, what checks, if any, he has drawn against the same which are still outstanding and unpaid. Until satisfactory information of this character shall have been furnished, the whole amount of such moneys will be held to meet the payment of his checks properly payable therefrom.

(4.) Hereafter, at the close of each fiscal year, the Treasurer, the several assistant treasurers, and designated and national-bank depositaries, will also render to the Secretary of the Treasury a list of all disbursing officers' accounts still unclosed which have been opened on the books of their respective offices or banks more than three fiscal years, giving in each case the name and official designation of the officer, the date when the account with him was opened, and the balance remaining to his credit.

(5.) In case of the death, resignation, or removal of a public disbursing officer, any check previously drawn by him and not presented for payment within four months of its date, will not be paid until its correctness shall have been attested by the Secretary or Assistant Secretary of the Treasury.

(6.) If the object or purpose for which any check of a public disbursing officer is drawn is not stated thereon, as required by Departmental regulations, or if any reason exists for suspecting fraud, the office or bank on which such check is drawn will refuse its payment.

CHARLES F. CONANT,
Acting Secretary.

The bond (*ante*, 152) may be in the form following:

KNOW ALL MEN BY THESE PRESENTS, That we, _____ and _____, of _____, in the _____ of _____, as principal, and _____ and _____, of _____, in the _____, of _____, and _____, of _____, in the _____, of _____, as sureties, are held and firmly bound unto the United States of America in the sum of eleven thousand dollars, (\$11,000,) lawful money, to be paid to the United States of America or their assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this _____ day of _____, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas draft No. B. 5068 on diplomatic warrant No. 519, drawn on the Treasurer of the United States on the twelfth day of March, anno Domini one thousand eight hundred and eighty-one, payable to the order of Louis P. Di Cesnola, late consul at Cyprus, for the sum of five thousand five hundred dollars and _____ cents, (\$5,500.—,) was at the date thereof delivered to a person who refuses to surrender or deliver the same to said Louis P. Di Cesnola, and so is, as to the said Louis P. Di Cesnola, lost.

And whereas the regulations of the Treasury Department of the United States require the party thus situated to give bond to the United States, with two sureties, to indemnify the United States, before a duplicate will be issued or any payment be made on account thereof; and the First Comptroller in the Department of the Treasury is willing to certify that a duplicate of the aforesaid draft should be issued in consideration of the premises and of the execution of this bond; and said draft, so issued, and the amount thereof payable on said warrant, should be paid:

Now, the condition of this obligation is such, that if the above-bounden obligors, their heirs, executors, or administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto any person who shall establish a valid adverse claim to the above-described original draft, the full value thereof, on demand, with interest until paid; or shall pay to the United States of America, or their assigns, in lawful money, any sum which shall be erroneously paid, or which shall be ascertained to have been erroneously paid, to the order of said Louis P. Di Cesnola in consequence of said application to the Treasury Department of the United States for a duplicate of said original draft, or for payment of the amount thereof, together with all legal costs, and interest on said sum until paid, without any defalcation or delay; then this obligation to be void, or else to be and remain in full force and virtue.

_____. [SEAL.]
_____. [SEAL.]
_____. [SEAL.]

(Signatures and wax or wafer seals of principal and sureties.)

Signed, sealed, and delivered in the presence of—

_____.
_____.
[Signatures of two witnesses.]

I do hereby certify that the sureties to the above bond are sufficient for the penalty thereof.

_____.
[Assessor or collector of internal revenue; U. S. judge, marshal, district attorney, clerk of court, assistant treasurer or depositary, collector of customs, naval officer, or surveyor.]

INSTRUCTIONS FOR EXECUTING THIS BOND.

1. The given names should be inserted and signed in full.
2. Carefully observe and comply with the instructions.
3. If a bank is the principal, the blank in the first and second lines of the bond must be filled thus: "The ——— Bank of ———, in the ——— of ———, by ———, cashier, duly authorized thereto by resolution of the board of directors." The bond must be signed for the bank by the cashier, thus: "The ——— Bank of ———, by ———, cashier;" and the seal of the bank must be affixed; and a copy of a resolution of the board of directors authorizing the cashier to execute the bond on behalf of the bank, certified to be correct by the secretary of the board under the seal of the bank, must be returned with the bond.
4. If a firm is the party in interest, the names of the individual members should be inserted as the principals of the bond, thus: "John Jones and James Smith, composing the firm of Jones & Smith;" and the bond should be signed by each of them.
5. The principal to the bond must make affidavit of loss. The form below given will answer in most cases:

AFFIDAVIT.

STATE OF ———, }
County of ———, } ss:

Be it known that before me, the undersigned, a ——— in and for said county and State, personally appeared ———, to me well known to be the identical person named in the foregoing bond, who, being duly sworn, deposes and says that the statement of facts given in said bond relative to the loss of the draft therein specified, is in all respects true, and deponent has made diligent search to find the said draft, in all places where it was likely to be found, without success.

Sworn and subscribed before me, this ——— day of ———, A. D. 188—.

Power of Attorney to receive Check or Draft from the Treasurer of the United States, to an Individual. (Ante, 161.)

KNOW ALL MEN BY THESE PRESENTS, That I, John Smith, of No. 17 Main street, city of Bellefontaine, of the county of Logan and State of Ohio, do hereby make, constitute, and appoint John Brown, of No. 17 F street, northwest, Washington City, D. C., my true and lawful attorney, for me, and in my place and stead, to demand and receive from the Treasurer of the United States draft No. 1860, dated April 1, A. D. 1881, for one thousand dollars, issued on War Department's settlement warrant No. 1960, [or Interior Department, Indian Office, or other Department.] and to receive and receipt for the said draft, but not to indorse it or receive payment thereof, giving my said attorney full power to do everything whatsoever necessary under the statute or executive regulation as fully as I could do if personally present, hereby ratifying and confirming all that may be done by my said attorney by virtue hereof. In witness whereof, I have hereunto set my hand, this 10th day of April, A. D. 1881.

JOHN SMITH. [SEAL.]
[Of wax or wafer.]

Signed in the presence of—
JOHN REESE.
JOHN SWEET.
[Two witnesses.]

STATE OF OHIO, }
County of Logan, } ss:

Be it known that on the 10th day of April, A. D. 1881, before me, John M. Lawrence, a notary public in and for said county, personally appeared the above-named John Smith, to me personally well known to be the identical person named in the foregoing power of attorney, who, in my presence, subscribed and acknowledged the said power of attorney to be his act and deed; and I do hereby certify that the said power of attorney was read and fully explained to the said John Smith at the time of acknowledgment.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year aforesaid.

[Notarial seal.]

JOHN M. LAWRENCE,
Notary Public.

To be acknowledged before an officer having authority to take acknowledgment of deeds.

This instrument must be signed in the presence of two persons, who must sign their names as witnesses.

The residence of both parties must be distinctly stated.

The acknowledgment must be certified according to the circular relating to powers of attorney to indorse drafts. (Moyer's case, 1 Lawrence, Compt. Dec., 125.)

This power of attorney (unlike that to indorse and collect a draft) may be executed prior to the date of the issue of the warrant or draft; but when so executed should so fully describe the claim to which it relates as to clearly identify and include the draft when issued. Or the power may be to receive any and all drafts or checks issued or to be issued by the Treasurer of the United States to the party executing the power, and thus include the draft.

Power of Attorney to receive Draft from Treasurer, to Copartners.

KNOW ALL MEN BY THESE PRESENTS, That the copartnership under the name and style of John Smith & Co. [Then proceed substantially as in foregoing form, and conclude thus:]

Witness the name of the said copartnership, this 10th day of April, A. D. 1881.

JOHN SMITH & CO.

By JOHN SMITH,

A member of said Copartnership.

Signed in the presence of—

JOHN A. PRICE.

DUNCAN DOW.

[Two witnesses.]

STATE OF OHIO, }
County of Logan, } ss:

Be it known that on the 10th day of April, A. D. 1881, before me, John M. Lawrence, a notary public in and for said county, personally appeared the above-named John Smith, a member of said copartnership firm of John Smith & Co. above named, to me personally well known to be such, and who in my presence signed the said copartnership name to the foregoing power of attorney, and acknowledged the said power of attorney to be the act of said copartnership firm; and I do hereby certify that I personally know said John Smith to be a member of said copartnership firm; that the said power of attorney was read and fully explained to the said John Smith at the time of acknowledgment, and that he then stated that he fully understood the same, and was satisfied therewith.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, the day and year aforesaid.

[Notarial seal.]

JOHN M. LAWRENCE,

Notary Public.

The following instructions must be particularly observed and complied with, viz:

1. The power of attorney should be executed in the copartnership name.
2. The signature must be made in the presence of two witnesses.
3. The place of business of the firm and the residence, respectively, of each of the copartners must be distinctly stated in the body of the instrument.
4. The instrument should be acknowledged before an officer having authority to take acknowledgment of deeds.
5. Evidence of the existence of the copartnership and of the authority of the copartner to execute the power of attorney will be required as in the case of powers to indorse. (Moyer's case, 1 Lawrence, Compt. Dec., 125.)

IN THE MATTER OF CLAIMANT'S RIGHT TO REVOKE POWER OF ATTORNEY.—MCALLISTER'S CASE.

1. The Treasurer is not bound to pay an agent or attorney, even on a power of attorney for that purpose executed by the claimant, unless some valid regulation of the Treasury Department so requires. His duties are not to be prescribed or modified by such power.
2. The duty of executive officers to make payment to claimants carries with it the power to make all inquiries necessary to its proper performance.
3. The "regulations" of the Department of the Treasury, and the general principles of law applicable to them and to statutes, are to be liberally construed for the purpose of giving to attorneys all proper means of securing the payment of fees from their employers.
4. A claimant cannot change his attorney in the prosecution of a claim in the Department of the Treasury without the consent of the Secretary. To do so is forbidden by a "regulation" duly authorized. Such a regulation has the force of law; but it does not and cannot interfere with the right of the Court of Claims, or of a commission created by Congress, to permit a change of attorneys prosecuting claims before these tribunals; nor with the right of a claimant to *revoke* the authority of an attorney to receive a draft issued for the payment of a judgment of the Court of Claims, or a claim allowed by a commission created by Congress, unless he is "*certified* by said court or commission as the attorney of record."
5. When an attorney has prosecuted a claim before the Commissioners of Claims, and has failed to procure their *certificate* required by the "regulations," the power of attorney given to him by the claimant to receive a draft from the Treasurer "for such sum as may be allowed" is *revocable*.
6. Consideration of the grounds upon which the loss of the right to revoke a power of attorney may be alleged, or upon which a claimant may be estopped from asserting such right.
7. Technically, and in strict legal parlance, there can be no *attorney of record* in the prosecution of claims before an executive department or a commission created by Congress, inasmuch as neither of these has, in the full sense, judicial power and a record.
8. A power coupled with an interest or a trust, or upon a consideration, or given as a security, is not revocable by the act of the maker.
9. A power of attorney, given before the issuing of a warrant for the payment of a claim, is prevented by section 3477 of the Revised Statutes, as well as by sound public policy and general common-law principles, (*U. S. vs. Robeson*, 9 Pet., 325,) from becoming a power coupled with an interest or a trust, or given upon a valuable consideration, or as a security.
10. When a power vests in the donee any legal or equitable interest, or charges him with a trust, the execution of which depends upon the exercise of the power, it is considered as coupled with an interest or a trust, and it is not generally revocable.

11. A power given for a valuable consideration is *not* a power for which the service to be rendered is the *sole* consideration; but a power under which, for example, an agent advances money or other property of value, upon an agreement, express or implied, that he is to be reimbursed for such advances, is such a power.
12. Agreements for the rendition of services or for the advance of money in the prosecution of claims, made upon consideration of the receipt and custody, as security for compensation or repayment, of the drafts to be issued in payment of such claims, are in contravention of law, public policy, and the regulations of the Treasury Department; and no agent or attorney can have an irrevocable power to receive or hold such drafts as such security.
13. A power given to an attorney to receive or hold a Treasury draft as security for compensation or repayment by reason of his having rendered services or advanced money in the prosecution of a claim, will be irrevocable only when given after the issuing of the warrant in payment of such claim, and conformably to the statutory provisions.
14. An injunction cannot interrupt or arrest the payment of money by the Government. Executive officers have not such jurisdiction for the prevention of wrongs and enforcement of rights as that which exists in courts of equity.
15. When a power of attorney has been given to receive a draft, and a revocation thereof has been made with an apparent purpose to avoid the payment of fees due the attorney, the Treasurer will be advised to pay the claimant in person at the Treasury; first giving notice to the attorney of the time and place of such payment, so that he may avail himself of any judicial remedies which he may have against the claimant.
16. The First Comptroller, being charged with the duty of settling the accounts of the Treasurer, and consequently of passing on the validity of all vouchers submitted by the Treasurer for payments made, is the only officer authorized to pass on the validity of powers of attorney (1) to collect *actual money* from the Treasurer, or (2) to receive and *indorse* drafts. He only can decide what powers are valid, and to whom money should be paid or drafts delivered. The "regulations" of the Treasury Department do not apply to such powers.
17. The First Comptroller, having such exclusive and final jurisdiction over questions affecting the settlement of the Treasurer's accounts, may *directly* advise the Treasurer as to his duties in paying warrants, and finally *decide to whom* they shall be paid. Necessarily incident to this jurisdiction is the power to decide who are entitled to receive drafts, in order that payments may thereby be made.

The material facts are as follows:

On May 25, 1871, Richard McAllister filed a petition on behalf of John G. Higginbotham, of Taylor's Depot, Lafayette County, Mississippi, addressed to "the Commissioners of Claims," under the act of March 3, 1871, (16 Stats., 524,) making a claim against the United States for \$4,609.50.

The petition, duly sworn to by the claimant, and otherwise properly authenticated, contains the following:

"Your petitioner hereby constitutes and appoints Richard McAllister, attorney-at-law, of Washington, D. C., his true and lawful attorney, with full power of substitution and association, to prosecute this, his

claim, and to receive a draft payable to the order of your petitioner for such sum as may be allowed, and to do all acts necessary and proper in the premises."

This is executed in the presence of two witnesses, is verified by affidavit, and duly stamped with a revenue stamp.

The Commissioners of Claims allowed the claimant \$1,569; and the act of March 3, 1881, made an appropriation to pay the same.

On March 24, 1881, the Third Auditor stated an account in favor of Higginbotham for said sum, with a memorandum therein that it was payable to the claimant, "care of Richard McAllister, attorney." The Second Comptroller certified a balance accordingly.

On April 4, 1881, the Secretary of War addressed a settlement requisition to the Secretary of the Treasury, asking him to cause a warrant for said sum to be issued in favor of said Higginbotham, "care Mr. Richard McAllister, attorney, present," due on settlement, as per certificate of Second Comptroller, No. 958, to be charged to the proper appropriation.*

While the requisition was pending before the Second Comptroller, application on behalf of Sullivan & Sullivan, attorneys, of Oxford, Mississippi, claiming to be attorneys of Higginbotham, was made that there be inserted in the Auditor's statement a memorandum that the draft should be sent to the "care of said Sullivan & Sullivan." The Second Comptroller decided that the statement in the requisition of the Secretary of War, that the draft should be sent to the care of McAllister, should remain as it was, in favor of McAllister, in the Auditor's statement, and as in the requisition.

On April 5, 1881, the Secretary of the Treasury signed a warrant payable to Higginbotham for said sum, with a statement therein that

*The requisition is as follows:

SETTLEMENT REQUISITION, } No. 1629.	WAR DEPARTMENT.	{ SECRETARY TREASURY, 1877. April 5, 1881, Warrant Division.
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To the SECRETARY OF THE TREASURY:

SIR: Please to cause a warrant for one thousand five hundred and sixty-nine dollars to be issued in favor of John G. Higginbotham, of Miss., care Richard McAllister, attorney, present, due on settlement, as per certificate of Second Comptroller, No. 958, to be charged to the undermentioned appropriations.

Given under my hand this 4th day of April, 1881.

\$1,569

ROBERT LINCOLN,
Secretary of War.

L. B. T.
Countersigned, April 5, 1881:

W. W. UPTON,
Second Comptroller.

J. F. J.
Registered April 5, 1881:
J.

E. W. KEIGHTLEY,
3d Auditor.

APPROPRIATIONS.

Claims of loyal citizens for supplies furnished during the rebellion, act March 3, 1881.....	\$1,569
J. W. B., C. M. P., 3865.	

the draft in payment should be sent "care Richard McAllister, president."*

When this warrant came, on March 6, 1881, to the First Comptroller to be countersigned, (Rev. Stats., 269,) an application was made on behalf of Sullivan & Sullivan, that the Treasurer be directed to send the draft to their care, in Mississippi.

There is on file with the papers a power of attorney, dated February 18, 1878, from Higginbotham to Sullivan & Sullivan, authorizing them to receive the draft, and purporting to revoke the authority of McAllister.†

It sufficiently appears from the evidence that McAllister was employed

*The warrant is as follows:

OFFICE OF THE SECRETARY OF THE TREASURY.
Division of Warrants, Estimates, and Appropriations. }
Form 58.

WAR

TREASURY DEPARTMENT.

[Vignette.] To the TREASURER OF THE UNITED STATES, greeting:

SETTLEMENT
WARRANT.

No. 1977.

\$1,569

APPROPRIATIONS.

Claims of loyal citizens for
supplies furnished during
rebellion \$1,569

Pay to John G. Higginbotham, care Richard McAllister, present, or order, to be charged to the appropriations named in the margin, one thousand five hundred and sixty-nine dollars, due — on settlement, pursuant to a requisition, No. 1629, of the Secretary of War, dated 4 April, 1881, countersigned by the Second Comptroller of the Treasury and registered by the Third Auditor. And for so doing this this shall be your warrant.

Given under my hand and the seal of the Treasury Department, this 5 day of April, in the year [SEAL.] of our Lord one thousand eight hundred and eighty-one, and of Independence the one hundred and fifth.

W. F. McL.
S. W. S.

J. K. UPTON,
Assistant Secretary.

Countersigned, 6th:

WILLIAM LAWRENCE,
First Comptroller.

* Registered:

GLENNI W. SCOFIELD,
Register.

OFFICE OF THE TREASURER OF THE UNITED STATES.

Received for this warrant the following draft:

No. — on —.
No. — on —.
Mailed —.

†This power is as follows:

THE STATE OF MISSISSIPPI, { ss:
Lafayette County,

KNOW ALL MEN BY THESE PRESENTS, that I, the undersigned, J. G. Higginbotham, of Lafayette county, Mississippi, have made, constituted, and appointed, and by these presents do make, constitute, appoint, and confirm, Sullivan & Sullivan, of Oxford, Mississippi, my sole, true, lawful agents and attorneys, to sue for, prosecute, collect, conduct, control, represent, and manage entirely and absolutely, my claim against the United States of America for supplies taken or furnished during the Rebellion to the United States Army, which claim, No. 4684, is now pending before the Southern Claims Commission, and any and all other claims which I may have or be entitled to against said United States; and I authorize said Sullivan & Sullivan to receive and receipt for in my name any and all drafts, moneys, and papers, and to do any and all things necessary in the premises to the collection of said claim or claims, as fully as I could do myself personally. And I do hereby, forever and fully, revoke any and all former or other powers of attorney or authorizations in the premises whatever.

Given under my hand and seal, on this 18th day of February, 1878.

J. G. HIGGINBOTHAM. [SEAL.]

This was duly attested and acknowledged before a proper officer.

as counsel for the claimant before the commissioners of claims and rendered the usual service required at Washington, where said commissioners held their sessions.

Sullivan & Sullivan prepared, at Oxford, Mississippi, the evidence in support of the claim, and on which it was finally allowed.

It is shown that in claims of this character the custom was that the resident attorney in Washington should receive one-half the usual fee, and the local attorney, who prepared the evidence in the State from which the claim came, a similar amount. There was no special contract as to the amount of fees to be paid in this case.

It seems from the affidavits that one Varden was employed in Mississippi by the claimant at an early period, not definitely stated; was paid \$19 for services in relation to the claim, and, after rendering some service, did nothing more; that Sullivan & Sullivan advanced money to pay expenses of prosecuting this claim, prepared all the evidence, having had no correspondence with McAllister as to this claim, though they had as to others, about which they held a personal conference, and agreed with him upon a division of fees for services in six other cases in which they were attorneys, pending at the same time with this; McAllister attending to the cases in Washington, and Sullivan & Sullivan in Mississippi.

The order made by the commissioners of claims, appointing the clerk of the court of Oxford, Mississippi, as commissioner to take testimony, was filled up by McAllister and signed by him as attorney. It was sent to Mississippi, where it was signed by the claimant, and also by Sullivan & Sullivan, as attorneys, and annexed to the depositions. McAllister examined the evidence, and submitted the case to the commissioners of claims for decision, without argument. He alleges that he watched its progress and saw that it was included, with others, in the proper appropriation bill in Congress, and had no notice of the revocation of his power of attorney until the hearing before the Second Comptroller.

T. W. Tallmadge, for *Sullivan & Sullivan*, made an elaborate oral argument, citing authorities. He also filed a brief and submitted the following points, made in writing by Sullivan & Sullivan:

First. We were employed by the claimant to prosecute and collect the claim; we took all the testimony and did all the work in the case, (except filing the original claim, which R. McAllister did, and his sub-agent, M. J. Varden, was fully paid for that by the claimant.)

Second. We advanced the claimant money to pay the expenses of taking the testimony and prosecuting the claim.

Third. We have never been paid one cent for our services, nor for our money advanced in the case.

Fourth. Before any testimony was ever taken in the case the claimant executed and delivered to us a power of attorney to represent him fully, and revoking all other and former letters of attorney.

Fifth. Claimant desires that we shall have the custody of the draft, and that McAllister shall not.

Sixth. The testimony would never have been taken, nor the claim prosecuted, except for us. It had been neglected.

Richard McAllister, *Richard McAllister, Jr.*, and *Hon. George E. Harris* submitted an argument, to this effect: It would be unjust to deliver the draft to Sullivan & Sullivan, because no notice was given to McAllister of any revocation. The Department regulation gives the

original attorney the right, and prevents a revocation. It was not necessary to procure a certificate from the commissioners of claims, because there was no contest before them as to the right. The question of the right of McAllister to the custody of the draft is *res adjudicata*, by reason of the decision of the Second Comptroller, and of the circular of the Secretary of the Treasury of July 19, 1880, saying that "hereafter the accounting officers will decide what persons, as attorneys or claimants, are entitled to receive drafts under the rules of the Department." The First Comptroller has no jurisdiction in such case as this.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

It is the duty of the Treasurer of the United States to pay every claimant on a warrant drawn in his favor. (Rev. Stats., 248, 269, 300, 305, 306, 307, 308, 3477, 3593, 3644, 3645, 3646, 3647, 4046, 4765, 5208, 5413.)

Payment may be made in *money* or by *draft*, in the discretion of the Treasurer, when no statutory provision or Department regulation otherwise directs. For the convenience of claimants, payment *may* be made by draft payable at the Treasury or any sub-treasury, or depository; but the mode and place of such payment are, under the limitations stated, to be determined by the Treasurer. This is the effect of the sections above cited; and his right to do so is dictated by considerations of financial policy and by the necessity of protecting the Government against improper payments. The statute as to powers of attorney is *permissive*, not *mandatory*, on the Treasurer. (Rev. Stats., 1778, 3477.) There may be disputed questions of the identity of a claimant, or of his legal capacity, and others of like character, which may render his personal presence necessary.

The Treasurer is not bound to pay an agent or attorney either in money or by draft, even on a power of attorney for that purpose executed by the claimant, unless some valid regulation of the Treasury Department so requires. The Treasurer's duties are not to be prescribed or modified by a power of attorney. There may be many cases where, for manifest reasons, if a power of attorney has been given to receive money or a draft, justice would require the payment of the money or the delivery of the draft under such power of attorney; as in the case of attorneys whose services have procured the allowance of a claim, and the custody of the draft or money is necessary to secure the payment of their fees. But even after the execution of such a power, an attorney may become legally incapacitated to transact business; or other reasons may appear why payment should be made directly to the claimant; and hence the necessity of a discretionary power in the Treasurer. The exercise of this discretionary power may be essential to avoid involving the United States in a liability which

might accrue in consequence of a payment made to a person unfit or not authorized to receive it. It may sometimes be necessary for the United States to file a bill of interpleader, though ordinarily a resort to this expedient is not advisable. (*Vermilye & Co. vs. Adams Ex. Co.*, 21 Wall., 138.) The duty of executive officers to make payment to claimants carries with it the power to make all inquiries necessary to its proper performance. (Inspectors' case, 1 Lawrence, Compt. Dec., 207.)

In the matter now under consideration, McAllister had the *first* power of attorney to receive the draft to be issued on the warrant. Under this he has a right to receive the draft, unless the power has been revoked; and in form it has been revoked by the subsequent power to Sullivan & Sullivan. This raises the question of the validity and effect of the second power of attorney. No objection is made to its form or mode of authentication. Its *effect* is alone the subject of controversy.

The question is to be considered as affected by (1) the "regulations" of the Department and (2) the general principles of law.

These are all to be liberally construed as in favor of affording to attorneys every reasonable means to enable them to collect from clients fees due for services. They are *remedial* in character, and the *equity* of their purpose should be carried into effect in order to secure their objects. (Sedgwick, Stat. and Const. L., 2d ed., 32, 251, 308-316.)

I.—The Department "regulations" have not the effect of prohibiting the revocation in this case.

1. The Secretary of the Treasury, having power to prescribe "regulations," has provided, by Department circular No. 130, of October 10, 1876, that "the claimant may change his attorney at any time, *with the consent of the proper officers* of the Department." (*Di Cesnola's case, ante*, 142.) The effect of this is, that the original attorney may not be changed without such consent. *Expressio unius est exclusio alterius*. This is a proper exercise of the power to make regulations, relating, as it does, to claims *being prosecuted before the Department of the Treasury*. (Rev. Stats., 161; Inspectors' case, 1 Lawrence, Compt. Dec., 207.) An authorized regulation has the force of law. (*U. S. vs. Eliason*, 16 Pet., 291.)

The claim on which the warrant in the present case issued was prosecuted before the "Commissioners of Claims," (16 Stats., 524, sec. 2,) and not before the *Treasury Department*, within the meaning of that portion of the circular above quoted; hence, no "consent of the proper officers of the Department" to change the attorney was requisite. The

Secretary of the Treasury cannot and has not attempted to interfere with the right of any court or commission to make its own regulations as to attorneys in the transaction of business before it.

2. The circular further provides that—

“In cases certified for payment by the Court of Claims, or by any commission created by Congress, the persons certified by said court or commission as the attorneys of record shall be regarded as such by this Department, and be entitled to receive the drafts in such cases.”

One of the objects of the circular, apparent from its language, was to avoid in the Treasury Department contests between attorneys over their respective rights to receive drafts, and generally to leave the decision thereof to the Court of Claims, or the commissions created by Congress, in cases severally disposed of by them. The Commissioners of Claims constituted a “commission created by Congress” within the meaning of the circular. Neither of the attorneys now asking for the custody of the draft to be issued on the warrant has shown that he is the person “certified by said commission as the attorney of record;” consequently no authority to receive the draft, within this clause of the circular, is shown, and to this extent there is no prohibition of the *revocation*. One reason for requiring the *certificate* doubtless is, that courts have a right to permit a change of attorneys, to suspend them from practice, and to regulate by summary proceedings their claims for fees. Commissions created by Congress for the adjudication of claims have a general power to determine who may prosecute claims before them, and to make or permit similar changes. (*In re Paschal*, 10 Wall., 483, 496; *Carver's case*, 7 Ct. Cls., 500; *Desmare's case*, 9 *Id.*, 1; *Bristol's case*, 11 Op. Att.-Gen., 7; *Di Cesnola's case*, *ante*, 142.)

3. When an attorney does not avail himself of the benefit of the certificate authorized by the “regulations,” he is left to the operation of general rules of common law governing the relation of principal and agent, or attorney.

It is not to be understood that an attorney who produces the certificate must, in such case, be conclusively regarded as the attorney. The “regulations” expressly reserve to the Secretary of the Treasury “the right in *all cases* to make such special orders as may be proper.” This right would exist without the reservation. (*U. S. vs. Eliason*, 16 Pet., 291. Or the Treasurer, under his duty to pay as imposed by the statute, could, in his discretion, and in case of doubt should, pay directly to the claimant. The certificate is to be regarded generally as *primá facie*, and not as conclusive, evidence. The attorney of record may become incapable of transacting business, or be so unworthy of trust as to render it improper to deliver a draft to him.

4. The question as to the *absolute* right of a claimant to revoke a power of attorney notwithstanding the Department "regulation," or as to how far he may be *estopped* from asserting any such right by his having permitted an attorney to proceed upon the faith reposed in such "regulation," does not arise in this case, because neither of the attorneys has produced the *certificate* requisite to enable him, even *prima facie*, to claim the benefit of the regulation. However an estoppel may operate as between principal and agent, it cannot affect the United States so as to require the Treasurer to make payment in case of disputed facts, or where a contested right thereto may involve the Government in liability. (Herman, Estoppel, sec. 219; Fossat's case, 21 How., 445; The Fossat case, 2 Wall., 649; *Alviso vs. U. S.*, 8 *Id.*, 337; *U. S. vs. State Bank*, 96 U. S., 30; *Johnson vs. U. S.*, 5 Mas. C. C., 425; *Lindsey vs. Hawes*, 2 Black, 554; *Vermont vs. Society for Propagation, &c.*, 2 Pa. C. C., 545; *U. S. vs. Collier*, 3 Blatch. C. C., 325; *Stow's case*, 5 Ct. Cls., 362; *Langdon vs. Doud*, 10 Mass., 433; *Candler vs. Lunsford*, 4 Dev. & Batt., L., 407; *Wallace vs. Maxwell*, 10 Ired., 110; *Taylor vs. Shufford*, 4 Hawks, 116.)

Neither of the attorneys now asking for the custody of the draft having established any right to its custody by force of the "regulations" of the Department, another inquiry presents itself, namely :

II.—THE EFFECT OF THE GENERAL PRINCIPLES OF LAW TOUCHING THE RIGHT OF REVOCATION.

Has the claimant a right, on general principles of law, to revoke the authority given to McAllister to receive the draft?

It is again to be observed that the question is not whether such right exists as to a claim prosecuted by the attorney *before the Department*, but as to a claim in the prosecution of which services were rendered before a "commission created by Congress," and as to which neither attorney has presented the *certificate* contemplated by the "regulations." The claimant had a right to revoke the power given to McAllister, unless for some reason he had lost the right or is estopped from asserting it.

The only grounds upon which such loss or estoppel can be alleged are :

- I. That a claimant has no right to change his attorney.
- II. That the power to McAllister was "*coupled with an interest*," and so not revocable.
- III. That it was given for a *valuable consideration*, and so not revocable.

IV. That the claimant, by permitting McAllister to continue as his attorney without notice of revocation until after the account for the payment of the claim was stated by the Third Auditor, is *estopped* from exercising any right of revocation.

These are all the grounds which it is supposed might be urged. They will be considered :

I.—The claimant in this case had a right to change his attorney while prosecuting the claim.

1. The "regulation" as to claims being prosecuted *in the Treasury Department* requires the assent "of the proper officers of the Department" to change an attorney. There is not and could not be a Treasury regulation prohibiting such change while the claim was before the commissioners of claims.

2. There was no "regulation" of the commissioners of claims prohibiting a change of attorney; and to this extent, therefore, no inference arises against the right of revocation.

It is well settled that a party who has a cause pending in a *judicial court*, in which he is represented by an *attorney of record*, cannot be "so fixed and tied up" by any arrangement, that he cannot change his attorney and employ such other counsel as he may desire; always being responsible for a violation of his contract. (*In re Paschal*, 10 Wall., 496; *Carver's case*, 7 Ct. Cls., 500; *Desmare's case*, 9 *Id.*, 1; *Bristol's case*, 11 Op. Att.-Gen., 7.)

This rule applies in the *judicial courts*; and, so far as the business of prosecuting claims in the Department is concerned, the same rule is generally applicable, subject to the circular regulation as to the "consent of the proper officers of the Department;" which can only mean that a new attorney who, for sufficient reasons, has been denied the right to act in the Department, cannot be substituted; and does not infringe the principle of the client's general right to make a change of attorney. The right of a claimant to be represented by counsel of his choice ought to be respected. His opinion as to the efficiency and usefulness of such counsel as he has may undergo a change. Circumstances which may impair the usefulness of the ablest lawyer are liable to occur at any time. The recognition by the courts, by the *quasi-judicial* commissions created by Congress, and, in analogy to these, by the Executive Departments, of the right on the part of every claimant to change his counsel in the prosecution of causes before them, respectively, is *some evidence* of the right on the part of a payee to *revoke* the authority given by him to an attorney or agent to receive a draft. The original attorney who prosecutes a claim in a Department is sometimes called the

attorney of record. This is the proper designation as to attorneys who have subscribed the pleadings in courts of record. Technically, and in strict legal parlance, there can be no *attorney of record* in the prosecution of claims before an executive department or a commission created by Congress, inasmuch as neither of these has, in the full sense, judicial power and a record. In popular parlance, however, such attorney may, in allusion or analogy to the corresponding officer in purely judicial tribunals, be termed, with tolerable accuracy, the attorney of record. He is an agent whose authority is recognized, and should, in order to certainty, be evidenced by a proper power of attorney, as required by the Treasury Department circular, No. 130, October 10, 1876. (Di Cesnola's case, *ante*, 142.)

3. When such agency or authority is recognized and so evidenced, it is pertinent to inquire what power remains in the principal or claimant to revoke it. If he has no right to change his attorney while the claim is in course of prosecution, it may well be maintained that he cannot, during the same time, revoke a power given for that purpose; and this inability would furnish some reason, whether conclusive or otherwise, for insisting that the power to receive a draft could not be revoked after the claim was allowed.

On this point there is no obstacle in the way of revoking the power.

II.—The power to McAllister is not "coupled with an interest," and is, therefore, in respect of any limitation arising from this reason, a revocable power.

This subject may be considered with reference to the effect of (1) *statutes* and of (2) the general principles of the *common law*.

(1.) It is a general rule that a power coupled with an interest or trust, or upon a consideration, or given as a security, is not revocable by the act of the maker; and equity will, where no officer of the Government is concerned, restrain the revocation of such power. *All other powers are revocable.* (Hunt *vs.* Rousmanier, 8 Wheat., 174; U. S. *vs.* Robeson, 9 Pet., 325; Lorings *vs.* Marsh, 6 Wall., 353; Trist *vs.* Child, 21 Wall., 441; Taylor *vs.* Benham, 5 How., 266; Posten *vs.* Rassette, 5 Cal., 467; Barr *vs.* Schroeder, 32 *Id.*, 609; Hynson *vs.* Noland, 14 Ark., 710; Bonney *vs.* Smith, 17 Ill., 531; Hutchins *vs.* Hebbard, 34 N. Y., 24; Brookshire *vs.* Voncannon, 6 Ired., N. C. L., 231; Wheeler *vs.* Knaggs, 8 Ohio, 169; Hartley's Appeal, 53 Pa. St., 212; Blackstone *vs.* Buttermore, *Id.*, 266; Mechlin & Alexander's case, 7 Op. Att.-Gen., 35; Receiver's case, 1 Lawrence, Compt. Dec., 373.)

No *interest* can attach to the power of attorney in this case, such as to constitute it a "power coupled with an interest;" because the
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statute prohibits all transfers and assignments of any claim, or of any part or share thereof, or *interest therein*, whether absolute or conditional, whatever may be the consideration therefor, unless made after the allowance of the claim and the issuing of a warrant for its payment. (Rev. Stats., 3477; *Trist vs. Child*, 21 Wall., 441; *U. S. vs. Gillis*, 95 U. S., 413; *U. S. vs. Robeson*, 9 Pet., 325; *Stow vs. U. S.*, 5 Ct. Cls., 362; *Flight vs. Salter*, 1 Barn. & Ad., 676; *Isaacs vs. Abraham*, 1 Cir. Mass., 1878, 6 Law Reporter, cited in 8 Abb. Nat. Dig., p. 36; *Mechlin & Alexander's case*, 7 Op. Att. Gen., 35; *Bristol's case*, 11 Op., 7; *Taylor's case*, *Id.*, 520; *Brooke's case*, 12 Op., 216; *Assignment case*, 16 Op., 261; *Safford & Co.'s case*, 1 Lawrence, Compt. Dec., 287; *Di Cesnola's case*, *ante*, 142.)

In the opinion of Attorney-General Cushing (7 Op., 35) there is no reference to the acts of July 9, 1846, (9 Stats., 41,) or of February 26, 1853, (10 Stats., 170,) though both these statutes had a direct bearing on the question before him.

(2.) The same result follows from general common-law principles.

If the power given to McAllister is "coupled with an interest," it is not revocable; otherwise, it is. (Story, Ag., 3d ed., secs. 462, 463, *et seq.*; 1 Pars. Cont., 6th ed., 69, 72; 2 Kent, Comm., 4th ed., 643, 644; *U. S. vs. Robeson*, 9 Pet., 325.) It is difficult to define *such* power; and the elementary books and decided cases are by no means so lucid and harmonious on this point as could be desired. (*Peter vs. Beverly*, 10 Pet., 563, 564.) Some powers are revocable by death which are not revocable *inter vivos*. (*Hunt vs. Rousmanier*, 8 Wheat., 201; s. c., 2 Mason, 244; s. c., 3 Mason, 294; s. c., 1 Pet., 1; *Smart vs. Sanders*, 5 M., G. & S., 895, 917; *Taylor vs. Benham*, 5 How., 233.) Here the parties are living, and all the interest which McAllister can claim is in the money to come from the exercise of the power given to him. Such an interest, even if it could arise or be created at common law, cannot, under section 3477 of the Revised Statutes, be recognized by the Treasury, and consequently cannot support his claim. (*Fenimore vs. U. S.*, 3 Dall., 364.)

Parsons says: "The revocation is not prevented by any interest in the money to come from the exercise of the authority; but the interest must be *in the property* on which the power is to be exercised." (1 Contracts, 6th ed., 73; Paley, Agency, 155; *Barr vs. Schroeder*, 32 Cal., 609; *Spear vs. Gardner*, 16 La. Ann., 383; *Hartley's Appeal*, 53 Pa. St., 202; *Blackstone vs. Buttermore*, *Id.*, 286; *Bancroft vs. Ashhurst*, 2 Grant's Cas., Pa., 513; *Coffin vs. Landis*, 10 Wright, 426; *Irwin vs. Workman*, 3 Watts, 357; *Smyth vs. Craig*, 3 Watts & S., 20; *Rochester*

vs. Whitehouse, 15 N. H., 468; *McDonald vs. Black*, 20 Ohio, 185; *Franklin vs. Osgood*, 14 Johns., 527.)

III. The power to McAllister is not irrevocable on the ground that it was given for a valuable consideration.

1. This results from the effect of provisions of the statute already considered.

2. The same result follows from general common-law principles.

It is said that an authority is always revocable unless it is (1) coupled with an interest, or (2) given for a valuable consideration, or (3) given upon a trust, or (4) as a security. (1 Pars. Cont., 70; 2 Kent, 644.) But this is very indefinite. In one sense a client who gives his attorney a power to prosecute an action, gives the power "for a valuable consideration,"—the services of the attorney. The authorities already cited show that *this* is not one of the cases of a power given for a valuable consideration. Again, it is said, that a power is not revocable "where the agent had begun to act under the authority, and would be damnified by its recall, or where the authority is part of a security." (1 Parsons, 70, *n.*) This gives no clear or sufficient definition or rule. An attorney who has begun the prosecution of a claim in an executive department may be damnified by the recall of his power; and yet the distinctions taken by the authorities show that this is not a case of irrevocable power. If a factor makes advances on goods intrusted to him to sell, and reimburses himself, his power is not revocable at the pleasure of the principal. He would be damnified by the recall of his power; but *this* damnification is not *alone* the *test* which defeats a right of revocation. (*Brown vs. McGran*, 14 Pet., 879; *Parker vs. Brancker*, 22 Pick., 40; *Frothingham vs. Everton*, 12 N. H., 239; *Blot vs. Boiceau*, 3 Comst., 78; *Kuapp vs. Alvord*, 10 Paige, Ch., 205.) The factor's power in such case is based upon a consideration; it is coupled with a trust, and it is part of a security.

When the power vests in the donee any legal or equitable interest, or charges him with a *trust*, the execution of which depends upon the exercise of the power, it is considered as coupled with an interest or trust, and is not generally revocable. (*Lorings vs. Marsh*, 6 Wall., 354; *Boone's Ex'r vs. Clarke*, 3 Cr. C. C., 389; *Bergen vs. Bennett*, 1 Caines' Cas., 1; *Hovey vs. Blakeman*, 4 Ves., 609; *Osgood vs. Franklin*, 2 Johns. Ch., 1; *Houghtaling vs. Marvin*, 7 Barb., 412; *Scruggs vs. Driver's Ex'rs*, 31 Ala., 274; *Saltmarsh vs. Smith*, 32 *Id.*, 404; *Ferris vs. Irving*, 28 Cal., 645; *McGriff vs. Porter*, 5 Fla., 373; *McDonald vs. Black*, 20 Ohio, 185; *Prinn vs. Stewart*, 7 Tex., 178; *Mich. Ins. Co. vs. Leavenworth*, 30 Vt., 11; *Taylor vs. Marling*, 2 Man. & Gr., 55.)

What is meant by the loose expression: "A power given for a valuable consideration"?

It is *not* a power for which the service to be rendered is the *sole* consideration.

It is a power under which, for example, the agent advances money or other property of value upon an agreement, express or implied, that he is to be reimbursed for such advances. (*Peter vs. Beverly*, 10 Pet., 563; *Parker vs. Brancker*, 22 Pick., 40; *Tucker vs. Wilson*, 1 P. Wms., 261; *Lockwood vs. Ewer*, 2 Atk., 303; *DeLisle vs. Priestman*, 1 Browne, Pa., 176; *Hart vs. Ten Eyck*, 2 Johns. Ch., 100; 1 Pars. Cont., 70; *Story, Agency*, 3d ed., sec. 74, n. 2; secs. 335, 338; *Britton vs. Turner*, 6 N. H., 493, 895; *Frothingham vs. Everton*, 12 N. H., 239; *Ex parte Smither*, 38 E. C. L. R., 532; s. c., 1 Deacon, 413; *Walsh vs. Whitcomb*, 2 Esp., 565; *Bromley vs. Balland*, 7 Ves., 28; *Gaussen vs. Morton*, 10 Barn. & C., 731; *Watson vs. King*, 4 Camp., 272; *Drinkwater vs. Goodwin*, 1 Cowp., 251; *Fisher vs. Miller*, 1 Bing., 150; *Mechlin's case*, 7 Op. Att-Gen., 35; *Assignment case*, 16 Op., 261.)

As to what constitutes a power given as a security, see *Hunt vs. Rousmanier*, 8 Wheat., 174; *Hodgson vs. Anderson*, 3 B. & C., 842; *Smart vs. Sandars*, 5 M. G. & S., 895; E. C. L. R., vol. 57.

The regulations of the Treasury Department, in effect, deny the right to make advances on the security afforded by the custody of a draft. (*Moyer's case*, 1 Lawrence, Compt. Dec., 136.) Such advances for the prosecution of cases in court are deemed to be against public policy. (*Barry vs. Whitney*, 3 Sandf., 696.) Generally, the same reason would apply as to attorneys before executive departments; and, if it did not, it would still be impracticable for the officials of the Government to protect persons who make advances. Though there may not be the same reasons of public policy as against advances of money unconnected with the prosecution of a claim; yet, for the reasons and conformably to the principles already stated, no such advances can render irrevocable the power to receive a draft. In other words, agreements for the rendition of services or for the advance of money in the prosecution of claims, made upon consideration of the receipt and custody, as security for compensation or repayment, of the drafts to be issued in payment of such claims, are in contravention of law, public policy, and the regulations of the Treasury Department; and no agent or attorney can have an irrevocable power to receive or hold such drafts as such security. This fact is worthy the attention of all parties concerned in the prosecution of claims against the Government. A power given to an attorney or other agent to receive or hold a Treas-

ury draft as security for compensation or repayment by reason of his having rendered services or advanced money in the prosecution of a claim, will be irrevocable only when given after the issuing of the warrant in payment of such claim, and conformably to the statutory provisions. (Rev. Stats., 3477; Di Cesnola's case, *ante*, 142.)

IV.—The claimant is not *estopped* from exercising the right of revocation by reason of his not having served notice of revocation on McAllister until after the account was stated for the payment of the claim.

1. The statutes already cited, and the construction given to them by the courts, prevent an estoppel in this case, because under them no interest could have attached to the power held by McAllister.

2. The same result follows from general common-law principles.

Estoppels are admitted for the purpose of preventing injustice to or fraud upon others. It is a wrong, at least, for a claimant to permit an attorney to render service under a power or upon a representation that he shall be paid from the avails of his labor, or before they shall pass into the hands of the claimant, and then to recall the power and repudiate the debt arising from such service. But the principle of estoppel does not apply in such case as this. (Herman, Estoppel, *passim*.)

An estoppel, as applicable to the present case, is "the preclusion of a person" from *denying the truth* of a representation he has made by word or act for the purpose of inducing another to act, and on the faith of which the latter has acted. (Bouv. Dic., "Estoppel;" Rawle, Cov., 3d ed., 407; Douglass *vs.* Scott, 5 Ohio, 199.) But there is no *denial* of what has been represented by the power of attorney to McAllister. The question here is, whether the claimant, who *admits the truth* of his representation in giving the power, can revoke the latter, and thus defeat rights acquired by the agent, through the rendition of services, on the faith that the power would continue until those rights were satisfied. This a question in the *law of agency*, and not in that of *estoppel*. The law of estoppel applies in judicial proceedings, and possibly sometimes in the administration of executive departments; but, if applicable at all in the latter respect, it will be admitted only under limitations and with extreme caution. No estoppel can exist when, as in this case, there is no mode of making its result available. (Di Cesnola's case, *ante*, 142.)

The question whether a court of equity could, in case of insolvency or other cause of jurisdiction arising between individuals, with which the Government is nowise concerned, and on an agreed statement of facts similar to that now presented, grant relief by injunction, is not

involved in the present inquiry. An injunction cannot interrupt or arrest the payment of money by the Government, (*Trist vs. Child*, 21 Wall., 441; *Draft case*, 1 Lawrence, Compt. Dec., 11; *Sallu's case*, *Id.*, 234; *Klink's case*, *Id.*, 255; *Safford & Co.'s case*, *Id.*, 276; *Receiver's case*, *Id.*, 374;) and executive officers have no such jurisdiction for the prevention of wrongs and the enforcement of rights as that which exists in courts of equity. (*Bonner vs. U. S.*, 9 Wall, 156.)

That McAllister is entitled to some reasonable compensation as attorney is clear. That the result of sending the draft to the attorneys in Mississippi will be to embarrass him in collecting the amount due him, if not in depriving him of compensation, is quite apparent. Evidently, all parties originally understood that he should, when the claim was allowed, and without subjecting him to the delay or expense of collecting in a distant State, be paid the sum due him. Still, as the claimant stands upon his legal right to revoke the power, the Government cannot deny or interfere with the exercise of this right. The Treasurer may, however, properly exercise his legal right to pay to the claimant in person at the Treasury. He may properly give notice to McAllister of the time and place of such payment. It will then remain for the latter to pursue such remedies as he may have, by judicial process, against the claimant. The adoption of the course suggested will not merely insure justice in this case, but also serve the same purpose in other cases of like character; and it will be a protection alike to claimants and to their attorneys. If this method of payment be attended with inconvenience to the claimant, it is nevertheless an expedient authorized by law and sanctified by the justice of its object.

It is to the interest of claimants, generally, that their attorneys shall feel secure of payment at the proper time for the services they render; otherwise, the latter will be obliged to impose on honest claimants, by increased fees, such a tax as will constitute an indemnity against the risks incurred as to obtaining from claimants who may prove unscrupulous any payment whatever.

The jurisdiction of the First Comptroller over this matter is called in question.

The subject of the delivery of drafts may be considered (I) without reference to any regulation of the Department, and (II) under such regulation.

(I.) OF THE TREASURER'S DUTY IN THE ABSENCE OF A REGULATION AS TO DRAFTS:

Powers of attorney affecting warrants drawn on the Treasurer are of three kinds: (1) Powers to collect money; (2) powers to receive and indorse Treasurer's drafts; and (3) powers merely to receive drafts.

In the absence of any "regulation," it is the duty of the Treasurer to pay warrants drawn on him; which he may do to the claimant in person, either in money or by draft, or to the claimant's agent, under a proper power of attorney. In the event of a contest among attorneys involving disputed questions concerning the revocation of powers, the safe course would be to pay directly to the claimant only, either in money or by draft.

The Treasurer is required to "render his accounts to the First Comptroller," (Rev. Stats., 305, 311,) which accounts the latter is required to settle; and thus, in order to such settlement, the Comptroller is obliged to pass on the validity of all vouchers submitted by the Treasurer for payments made. If a power of attorney to *collect* and receipt for *actual money*, executed conformably to sections 1778 and 3477 of the Revised Statutes, be presented to the Treasurer, the duty of passing on its validity is incumbent on the First Comptroller; and if an attempt be made to revoke such power, it is incumbent on the latter to determine the validity and effect of such attempted revocation. If the power of attorney be to *receive and indorse a draft*, and thus to collect money, the First Comptroller must necessarily decide the same question of validity. The practice is for the Treasurer to submit all such questions to him in advance of payment.

Hence, the validity of *all* powers of attorney authorizing the indorsement of drafts to be paid by the Treasurer is determined by the First Comptroller; and, after approval by him, such powers are filed in his office. When he approves a power, he makes an indorsement on the draft, in the following form:

"FIRST COMPTROLLER'S OFFICE.

"Payment to John Smith, attorney, is authorized by virtue of power filed in this office.

"WILLIAM LAWRENCE, *Comptroller.*"

In the cases, then, of either (1) a power to demand and receipt for *money*, or (2) a power to *receive and indorse a draft*, the First Comptroller is the *only officer* who is charged with the duty of passing on the validity and scope of such powers. In these cases no regulation affecting the duty of the Treasurer or First Comptroller has been made. The "regulations" as made apply only to powers to *receive drafts merely*—not to those to *collect money* or *indorse drafts*. None could be made which would relieve or discharge the First Comptroller from the duty enjoined by law upon him. The power to make "regulations" is limited to such as are "not inconsistent with law." (Rev. Stats., 161.) A draft indorsed without authority cannot be lawfully paid. If there be

two adverse attorneys severally claiming to act, under different powers, only one can have lawful authority to indorse. The First Comptroller must decide which of them has this authority, the possession of which is indispensable to render the indorsement a valid voucher for the Treasurer in his settlement with the First Comptroller. The receipt of the claimant on the warrant, or a properly-indorsed draft, is a legal voucher. (Rev. Stats., 305, 311, 3645.) The rulings of the First Comptroller on these and all other questions which come officially before him in the settlement of accounts and countersigning of warrants are not merely advisory; they have the effect of final *decisions*.

(II.) OF THE TREASURER'S DUTY AS AFFECTED BY "REGULATIONS:"

The duty of the Treasurer is to pay the party entitled to payment. No "regulation" can interfere with the discharge of this duty. (Clyde *vs.* U. S., 13 Wall., 38.) No regulation can or has been made to take from the First Comptroller the power given by statute to decide what are legal vouchers. The "regulations" of October 10, 1876, and July 19, 1880, are those in force on this subject. (See Di Cesnola's case, *ante*, 142.) Those of October 10, 1876, provide, as to each claim prosecuted in the Department, that the attorney shall present a power of attorney; that he shall be regarded as the attorney in such case, with the right to receive any draft therein; that the claimant may, "with the consent of the proper officers of the Department," *change his attorney "at any time;"* that drafts be delivered to the *proper attorney*; the Secretary reserving the right in all cases to make such special orders as may be proper. Those of July 19, 1880, declare that "the accounting officers will decide what persons as attorneys or claimants are entitled to receive drafts under the rules of this Department."

The question whether the First Comptroller has authority to pass finally on all *questions of law* affecting the duty of the Treasurer to deliver drafts need not now be decided. (See Bender's case, 1 Lawrence, Compt. Dec., 317; Bender's case, (Second,) *Id.*, 391; McKnight *vs.* U. S., 98 U. S., 179; s. c., 13 Ct. Cls., 307.)

The First Comptroller, having exclusive and final jurisdiction generally over all questions affecting the settlement of the Treasurer's accounts, may *directly* advise the Treasurer as to his duties in paying warrants, and finally *decide* to whom they shall be paid. Necessarily incident to this jurisdiction is the power to decide who are entitled to receive drafts, in order that payments may thereby be made. The incident follows the principle: *Accessorium non ducit, sed sequitur suum principale*. The regulations do not specify the *particular* "accounting

officers" who are to decide what persons are entitled to receive drafts. It is not said that the Second Comptroller may review the opinion of the Second, Third, or Fourth Auditor; and yet, in practice, as being a reviewing officer, he does so. For some purposes, the First Comptroller is also a reviewing officer, and particularly so on all matters affecting the settlement of the Treasurer's accounts.

It might happen that after the Second Comptroller had passed on a question of this sort the facts and circumstances should have so changed as to affect materially or alter entirely the duties of the Treasurer as to making payment or delivering a draft. The action of the First Comptroller in countersigning a warrant is always subsequent in time to the action of the Second Comptroller. *The duties of the Treasurer are to be decided by the conditions existing at the time the draft is issued*, which is substantially contemporaneous with the countersigning of the warrant by the First Comptroller, who may therefore be the only accounting officer having a duty to perform in relation to the warrant at a time when it would be possible to decide a question as to the attorney entitled to receive a draft.

When the warrant is presented to the First Comptroller to be countersigned, the question *then* arises before him, and he then has jurisdiction in the matter. (*Allen vs. Blunt*, 3 St. C. C., 742; *Wilkes vs. Dinsman*, 7 How., 89.)

When, as in this case, and pursuant to the general usage, the memorandum is carried into the *warrant*, directing the delivery of the draft to an attorney named, the First Comptroller, if he countersigns the warrant, sanctions thereby the order to so deliver it. He is thus required to pass directly on the question. Whenever he is required thus to sanction such order, he may and must inquire whether it be authorized or unauthorized by law. When a draft is claimed under a power of attorney which has been revoked, it is unlawful to deliver it under that power.

Then, again, if a draft be delivered to an attorney without any authority from the claimant, and such attorney should refuse to deliver it to the claimant, it has been decided that a duplicate may be issued and delivered to the claimant. (*Di Cesnola's case*, *ante*, 142.) The First Comptroller is the only officer who can decide authoritatively on the legality of issuing such duplicate, because this becomes, when properly indorsed, a voucher for the Treasurer in the settlement of his accounts, to be passed on by the First Comptroller. A decision of any other officer that the original should be delivered to a party claiming to be attorney, can therefore be of no avail. The "regulations" must

consequently, upon well-settled rules of construction, be deemed as giving the First Comptroller final authority: *Ut res magis valeat quam pereat*.

In a case like the present one, to which the regulations do not apply, and in those cases which are not subject to regulations, the Treasurer, so far as any direct statutory provision is concerned, may upon his own responsibility decide what are his duties as to payment. In such cases, any direction to him would, strictly speaking, seem to be only advisory; but since the First Comptroller must decide on the validity of his vouchers of payment, the direction becomes practically binding and conclusive. In like strictness, there is no statute authorizing a statement or direction in a warrant as to the disposition to be made of a draft. In those cases which are subject to "regulations," the Secretary of the Treasury may prescribe the mode and place of payment, or of the delivery of the draft. But it is not necessary now to decide all these questions.

The principles affecting the question raised by this case have been considered more fully, and the reasons in support of the conclusions reached have been presented more at large, than in some other cases, because of the great importance of the question and the respect due to the action heretofore had.

The result of this consideration is, that in the present case, at all events, it is proper to advise the Treasurer not to issue any draft, but to make payment in money to the claimant in person at the Treasury in Washington; first giving to McAllister, and to all the attorneys concerned, notice of the time and place of such payment to the claimant.*

TREASURY DEPARTMENT,

First Comptroller's Office, April 14, 1881.

* Under the laws in force in the District of Columbia, money, *after* it has passed from the Treasurer of the United States to a claimant, can be seized in attachment, if it can be lawfully reached. (Rev. Stats. Dist. Col., sec. 782; act June 1, 1866, ch. 103, sec. 1, vol. 14, Stats. at Large, p. 54.)

After judgment for a debt contracted in the District a debtor can be arrested on a *capias ad satisfaciendum*, on a showing that he is attempting to commit a fraud on the creditor. (Rev. Stats. Dist. Col., 794, 796; act June 17, 1844, ch. 100, vol. 5, Stats. at Large, pp. 678-9.) Whether there is a remedy by writ of *ne exeat*, may be a question of some importance.

IN THE MATTER OF ATTORNEYS' CONFLICTING CLAIMS TO RECEIVE TREASURY DRAFT.—CLIFT'S CASE.

1. When a power of attorney relates to a matter provided for by existing laws, it cannot, by implication, be extended to matters arising under, and rights created by, laws subsequently enacted: its terms must be construed strictly.
2. A power authorizing an attorney to prosecute a claim for money alleged to be *due* a claimant from the United States, under an *existing law*, does not authorize the attorney to prosecute a claim for money *not* then due, but which only becomes due thereafter under an act subsequently passed by Congress.
3. A power of attorney may be made so comprehensive in its terms as to authorize an attorney to prosecute a claim for money due under an existing statute, or *to become due* under a statute to be enacted.
4. To render a power of attorney irrevocable because coupled with an interest, "there must be an interest in the thing itself, and not merely in that which is produced by the exercise of the power."
5. The "regulations" of the Department applicable to powers of attorney presented, and their effect considered.

The material facts in this case are as follow:

October 22, 1872, William B. Clift and others at Cincinnati, Ohio, made a written contract with A. S. Meguire, then of Washington City, by which they agreed "that for and in consideration of services to be rendered by him, [Meguire,] or his agent, or attorney, or attorneys, or either, or any of them, in the matter of obtaining certain moneys from the United States Government, *due them* [the claimants] severally for wages during their imprisonment in Texas, during the late Rebellion; to pay or cause to be paid to him, the said A. S. Meguire, the sum of *fifty per cent.* of any and all amounts so recovered, the same to be a lien upon any judgment, draft, or check issued or rendered therein, or therefor, or other evidence of indebtedness relating thereto. The same not to be affected by any services or agreement rendered by any other party or parties whomsoever, or with any other such party or parties."

October 24, 1872, a power of attorney was duly executed by Clift and David Dunseath, as follows:

"Know all men by these presents, that we, David Dunseath and William B. Clift, of Campbell County, and State of Kentucky, have made, constituted, and appointed, and by these presents do make, constitute, and appoint A. S. Meguire, of Washington, in the District of Columbia, true and lawful attorney irrevocably for us, and in our name, place, and stead, to demand, settle, and collect of the United States Government, *through any of its departments, courts, or commissions*, our several claims against the same, as pilots in the employ of said United States during our captivity, or the duration thereof, in the prisons in Texas, and to prosecute to judgment, or final termination, the same, and to receive any check or draft given in payment of the same, and to have access to any papers on file in any of the departments relating thereto, or before any committee of Congress, and

if necessary to withdraw the same, and to file other evidence in the proper place, or before the proper court, hereby revoking and annulling all other previous powers of attorney, or authorizations whatever in the premises, giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as we might or could do, if personally present, with full power of substitution and revocation; hereby ratifying and confirming all that our said attorney or his substitute shall lawfully do, or cause to be done, by virtue hereof."

A. S. Meguire, by affidavit, states that he removed from Washington to Chicago, at a date not shown, and left the claims mentioned above in the care of James F. Meguire, of Washington, with instructions to prosecute them.

It is shown that A. S. Meguire rendered his services in the Navy Department, and before the Fourth Auditor and Second Comptroller in the Treasury Department; and he alleges that he expended money in travelling and preparing evidence to secure the allowance of the claims in the Departments, but was unsuccessful.

James F. Meguire states by his affidavit that "he presented the cases of the claimants to the 45th and 46th Congress, and performed much and valuable professional services as an attorney before the various committees of the two Houses of Congress, before which the [several] bills for the relief of the claimants came, and he is informed and believes that the final passage of the bill for the relief of the claimants was wholly due to his services."

He submits other evidence tending to prove the same statement.

June 9, 1877, Clift executed a power of attorney to J. F. Kinney, authorizing him "to prosecute and collect" this claim, and "revoking all former powers of attorney or authorizations whatever."

March 10, 1879, Clift executed to J. F. Kinney another power of attorney, as it declares, "to prosecute my claim before the Congress of the United States for pay as pilot while I was confined in a Confederate prison in 1864 and 1865, after my capture from the U. S. Navy Transport Champion, No. 3, on Red River, Arkansas, in April, 1864, with full power of substitution and revocation, hereby revoking all former powers of attorney, and granting unto my said attorney full power and authority to do and perform all lawful acts necessary in the premises; to receive any money which may be due me on this claim, and to sign my name in full acquittance thereof."

March 8, 1881, Clift made to said Kinney another power of attorney, declaring "that I make this statement for the purpose of collecting pay and commutation for rations for the time I was prisoner of war, and for the time it took me to reach my home after my imprisonment, under an act of Congress entitled an act for relief of several persons impressed into the United States naval service, approved March 3d, 1881. And I hereby constitute and appoint J. F. Kinney my true and lawful attorney for me and in my name to prosecute this claim, and to receive and receipt for any and all money or draft given or granted me on this claim."

There is evidence tending to show that Kinney was employed by Clift in 1876 to prosecute his claim; that, late in 1877, Kinney made out a new claim for Clift, covering all the former claim, and, in addition, extra pay and commutation of rations for the time it took the claimant

to reach his home after being released from prison; that in January, 1873, Kinney prepared bills, caused them to be introduced in Congress, and rendered services in the prosecution of the claim, which, as he alleges, resulted in the passage of the bill for the relief of the claimants.

Clift and Dunseath, by affidavit, say that they employed A. S. Meguire, in October, 1872, on an assurance that the claims could be secured in sixty days; that they did not afterwards hear from him; and that in 1878 they employed Kinney.

D. K. Hickey, by affidavit, says that since December, 1879, he has been private secretary of one of the Senators having in charge the bill for the relief of the claimants; that he believes it was owing to the exertions of Kinney that the bill was reported, and knows, or has reason to believe, that no other attorney ever pressed the passage of the bills upon said Senator.

Kinney states that in February, 1877, he notified James F. Meguire that he (Kinney) held powers of attorney from the claimants, which revoked all former powers, and that he alone had authority to act; which statement is denied by Meguire.

There was much other evidence, but sufficient has been stated to present the questions of law.

In favor of this and other claimants on the matters presented to Congress, an act was passed as follows:

"AN ACT for the relief of several persons impressed into the United States naval service.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed, out of any money in the Treasury not otherwise appropriated, to settle and pay to the several persons comprising the crews of the steamers Champion numbers three and five, or their legal representatives, for the time they were each held as prisoners of war, including the necessary time it took them to reach their homes after their release, at the same rate or pay per month they were each receiving at the time they were captured; also for commutation of rations for same time, to be settled and paid upon proper applications to be made under this act, and passed upon by the proper accounting officers of the Treasury.

"Approved, March 3, 1881."

Under this act an account was stated by the Fourth Auditor, and a balance certified by the Second Comptroller, in favor of Clift, for \$4,183.60.

A contest was made before the Second Comptroller, between Meguire and Kinney, as to the right to receive the draft to be issued for the payment of the claim; and that officer made on the Auditor's statement a memorandum or indorsement thus: "Care J. F. Meguire;" thereby indicating that the draft was to be delivered by the Treasurer to Meguire.

The warrant to the Treasurer to make payment was signed April 12, 1881; by the Secretary of the Treasury, and came to the First Comptroller to be countersigned; whereupon Kinney asked the Comptroller to give direction to the Treasurer to deliver the draft to him, (Kinney.)

I. G. Kimball, of Washington City, for Meguire, made an elaborate and able oral argument, maintaining that—

I.—The power of attorney to Meguire is not revocable by Clift, being given in consideration of the performance of services deemed valuable,

and as a security for money advanced; and Clift having, from the nature of his contract and direct terms, agreed not to revoke it, the law will not permit him to do so. (*Hunt vs. Rousmanier*, 8 Wheat., 201; see, also, the contract made by Clift, in the last clause of the agreement, dated October 22, 1872.)

II.—The allowance of commutation of rations to prisoners of war was a matter of statute law at the time, the same having been paid ever since the passage of the act of July 25, 1866. (14 Stats., 364.)

III.—The allowance of pay to prisoners for the time necessary to enable them to reach their homes has always been made. (See letter of the Third Auditor, dated January 24, 1878, in Senate Rep., 331, 2d Sess. 46th Cong.)

IV.—The power of attorney and Clift's contract with Meguire fully authorized the latter—nay, by clear implication, and from the nature of the case, made it his duty—not only to present the claim before Congress, but in direct terms empowered him to withdraw evidence before the departments or any committee of Congress, and “to file other evidence in the proper place, or before the proper court.” Congress is thus especially named, and after the rejection of the claim by the executive departments, Congress was the only “proper place” before which to present it. Meguire would have been liable to an action for neglect of duty if he had failed to so present it.

V.—The power of attorney being thus in full force and effect, Meguire is the only person entitled to receive the draft in this case, and the same ought to be delivered to him.

Hon. Samuel Shellabarger, Hon. Jeremiah M. Wilson, and J. F. Kinney, *contra*, also made elaborate and able arguments, claiming that—

I.—The power to Meguire is absolutely without force, as sought to authorize services before Congress, because it does not apply to the *claim* allowed under the act of Congress, but authorized services only before the departments, courts, or commissions. (*Wright vs. Ellison*, 1 Wall., 16; 16 Op., 261.)

Special and limited agencies defining the power or prescribing the methods of execution must be *strictly* followed. (*Perry on Trusts*, 1st ed., sec. 475, p. 436, n. 6; *Hodge vs. Combs*, 1 Bl., 192; *Powell vs. Tuttle*, 3 Comst., 396; *Bac. Abr.* “Att’y,” Story, Agency, 25.)

II.—The claim can only be “upon proper application to be made under” the special act of Congress. The power to Meguire does not give authority to make *such* application.

III.—The power to Meguire is revocable, and is revoked. (Act July 29, 1846, 9 Stats., 41, secs. 1–7; 9 Op., 128; 11 Op., 7; 12 Op., 216; 16 Op., 261; Story, Bailments, 209; *Salt vs. Field*, 5 Term R., 213; *Bowerbank vs. Morris*, Wall., C. C., 126; 6 Beam., 316; Story, Agency, 462, 477; 2 Kent, 893; *Brookshire vs. Brookshire*, 8 Ired., 74; *Copeland vs. Marine Ins. Co.*, 6 Pick., 198; *Smith*, Merc. Law, 71; 2 *Livermore*, Agency, 308; *Paley*, Agency, 184; *Chitt. Com. L.*, 223; 1 *Pet.*, 1; 3 *Barn. & C.*, 842; 10 *Id.*, 731; 2 *Story*, Eq., 1041.)

IV.—The bill which became a law, and on which this claim is based, provided for and allowed some four claims for which Meguire was attorney, and Kinney was not; and this fact accounts for any services which may have been rendered by Meguire in aid of said bill.

V.—The claim as made out by Kinney covered extra pay, and commutation of rations, not covered by the claim previously made, *after* the release from prison of the claimant, and which items are provided for in the relief act. The power to Meguire does not extend to this.

VI.—An attorney before a department of the Government, differing from an attorney before the courts, of which he is a sworn recognized officer, where his acts are public, can act as and assume only to be "attorney in fact" when he acts with *due diligence*, and keeps his client informed of the state of his business. (4 Burr., 2061; 1 Barnwell & Alderson, 202; Bac. Abr. "Att'y;" Story, Agency, sec. 25; Russell vs. Palmer, 2 Wilson, 328; Swannell vs. Ellis, 1 Bingham, 347; Chit. Cont., 603, 605.)

From 1872 to 1876 or 1877, no service was rendered by either of the Meguires, and they failed to correspond with Clift after 1872. No notice was given by A. S. Meguire that he had gone to Chicago, or had left the claims with James F. Meguire. The revocation of the power to Meguire was justified, and he *had notice of it* before he did anything as to the bills in Congress.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

There is no controversy as to the sufficiency in form of the powers of attorney to Kinney, nor as to their giving him the right he asserts, unless this right was barred by the contract with, and power of attorney given to, Meguire.

There are several grounds upon which the right asserted by Meguire must be denied.

I.—The power of attorney to and contract with Meguire do not extend to the *claim* allowed under the act of March 3, 1881, passed for the relief of the crews of steamers "Champion, numbers one and two." That the warrant in this case in favor of Clift was issued under the relief act of March 3, 1881, is not disputed. It was issued under no other act.

The *contract* of Clift and the other parties with A. S. Meguire is *expressly* for "services to be rendered by him in the matter of obtaining certain moneys from the United States Government, *due them* severally *for wages* during their imprisonment." Money *due* for *wages* means money due under *existing law*. There was a law—the act of July 25, 1866, (14 Stats., 364,) referred to in the able argument of the learned counsel for Meguire—under which it was *claimed* that money other than for wages was *due*. The contract was made with reference to that law. The power of attorney to Meguire was given in view of that act. It might have been given to cover money to become due under an act to be passed; but it was not so given. When a power of attorney relates to a matter provided for by existing laws, it cannot, by implication, be extended to matters arising under, and rights created by, laws subsequently enacted. The contract with and power to A. S. Meguire pointed to existing law—to money then *due*; but in contemplation of law, the money authorized to be paid by the relief act

referred to did not become due until the date of its approval, namely, March 3, 1881. The terms of the power must be construed strictly, and hence they exclude any purpose to authorize or require services in securing legislation, or in asserting a claim for money *not due*. The power does not extend to matters involving future legislation, or to rights accruing therefrom. To extend the contract and power to a claim under the relief act would involve the adoption of a *principle* and a *construction* which might inflict gross injustice.

The contract in terms says that there shall be paid to Meguire "fifty *per centum* of any and all amounts so recovered;" that is, of "certain moneys from the United States Government due them," (Clift and others.)

Meguire presented a claim to the proper executive department of the Government asking for the allowance of the moneys referred to in the power of attorney, and the claim was rejected. This was a final adjudication of the matter, and the rejection was in effect a decision that the claimant had no right to such moneys. The relief act of March 3, 1881, cannot be construed as reversing that decision, but rather as providing for a special case; and it gave a right to receive money, which right, before its approval, did not exist. In strict law, the accounting officers must regard the matter referred to in the last power of attorney to Kinney as a matter *entirely different* from that referred to in the power of attorney given to Meguire.

The claimants might be willing to give, for the service to be rendered in obtaining an allowance of the claim, fifty *per centum* of moneys *due*, as they supposed, by *existing law*; but if a *future law* should give a largely *increased sum*, they might not at all consent to give for the service one-half of that sum. Unless the terms of the contract and power taken together manifest at least fairly, if not clearly, an intention to apply to all money which might become due by future legislation, they cannot be construed as extending to such money.

In addition to all this, the relief act expressly requires applications to be "made *under this act*." It cannot be said that a power of attorney made before the act was passed, and with no terms referring to it, can authorize an application under it. The act gives a right to *some compensation* not at all alluded to in the contract with or power to Meguire.

It is a well-settled rule of construction that "a statute referring to, or affecting persons, places, or things, is limited in its operations to persons, places, or things as they existed at the time the statute was passed." (U. S. *vs.* Paul, 6 Pet., 141; Hall *vs.* State, 20 Ohio, 16.)

So a power of attorney will generally be construed with reference to existing laws and facts.

II.—The power of attorney given to Meguire to prosecute the claim referred to therein was clearly and legally revoked. It was revocable at common law, without the statutory provision. (*U. S. vs. Robeson*, 9 Pet., 325; *Rev. Stats.*, 3477; *Di Cesnola's case*, *ante*, 142.)

The right of revocation has already been sufficiently shown in another case, and it is unnecessary to repeat the argument or cite the authorities here. (*McAllister's case*, *ante*, 167; *Taylor vs. Benham*, 5 How., 233.)

The Secretary of the Treasury, (B. H. Bristow, distinguished for his great learning as a lawyer,) in a circular of April 16, 1875, stated the rule to be, as to powers of attorney irrevocable because coupled with an interest, that "there must be an interest in the thing itself, and not merely in that which is produced by the exercise of the power."

This is the general rule at common law, and seems to be recognized by the legislation of Congress. (*U. S. vs. Hall*, 98 U. S., 357; 9 Stats., 41; 10 Stats., 170; *Rev. Stats.*, 3477.) This rule of law has not been changed by any "regulation." If this rule may work hardship, Congress alone has authority to change it. Executive officers must obey the law as it is. On this subject there are many instructive lessons. (*Numbers*, xxii, 15-22.)

III.—Meguire is not aided by the "regulations" of the Department. The regulations of October 10, 1876, being circular in relation to powers of attorney, make four provisions as to drafts. These are as follow:

1. "In every case to be *finally adjudicated in this Department*, the attorney shall present a letter of attorney from the claimant to prosecute the case, and shall be regarded as the attorney in such case, with the right to receive any draft therein. The claimant may change his attorney at any time, with the consent of the proper officers of the Department."

2. "In cases certified for payment by the Court of Claims, or by any commission created by Congress, the persons *certified by said court or commission* as the attorneys of record shall be regarded as such by this Department, and be entitled to receive the drafts in such cases."

3. "In all cases drafts for claims will be made to the order of the claimant, and will be delivered to the *proper attorney*, according to this order."

4. "The Secretary reserves the right in all cases to make such special orders as may be proper."

The circular of July 19, 1880, declares that—

"Hereafter, the accounting officers will decide what persons as attorneys or claimants are entitled to receive drafts under the rules of the Department. This practice will prevent the delay occasioned by sending the papers to the Secretary or Assistant Secretary for such decision."

The second clause of the circular of October 10, 1876, does not reach this case. The fourth clause does not apply, as the Secretary has made

no "special order." The third clause, by a well-known rule of construction, relates to drafts in all cases not covered by the other clauses. (Sedgwick on Stat. and Const. L., 209; N. L. & B. Inst. *vs.* Com., 14 B. Monroe, 266.) Or, if the third is to be deemed as controlling the preceding clauses, it means that "in *all* cases" drafts "will be delivered to the *proper* attorney"—that is, to the attorney who, *by law*, is entitled to receive them. The first clause does not in fact relate to this case; but, whether it does so or not, it is shown by the decisions in Di Cesnola's case, *ante*, 142, and McAllister's case, *ante*, 167, that by every rule of law Kinney is "the proper attorney." It is scarcely to be presumed that any regulation is to be construed as requiring a draft to be delivered to any but the proper attorney. A regulation may, however, be made to determine to a certain extent the persons to whom drafts should be delivered. The first clause does not apply to Meguire, unless it be to *exclude him* from the right to receive the draft. In *one sense* the claim of Clift presents a case "finally adjudicated in this Department." It was finally allowed under the relief act. But this clause says "the attorney shall present a letter of attorney from the claimant to prosecute *the case*, and shall be regarded as the attorney in *such case*, with the right to receive any draft *therein*." Now "*the case*" here "finally adjudicated" is one arising under the relief act. Meguire does not present a power for "*the case*." *The case* [claim] did not exist when the power was given in October, 1872. *The case* is a claim under the relief act of March 3, 1881. Until that act was passed there was no case—no claim—such as has been allowed. The *claim* which Meguire prosecuted was under a prior law, and it was rejected. Kinney does present a power "to prosecute *the case*," and hence, as the regulation says, "shall be regarded as *the attorney*." But if the power to Meguire had been sufficiently broad in terms to prosecute a claim under the act of July 25, 1866, *and also under any future act*, still he would not be aided by the first clause of the "regulation," which merely gives a right to receive a draft to the attorney who *prosecutes the case under the act* which allowed the claim. It looks to services *before the Department*, and was intended to apply to the attorney for such services.

The right to receive the draft in this case is not asserted *by reason solely of services in the Department* under the relief act. No contest was made in the Department under this act. The "regulation" is not designed to protect the rights of attorneys for services rendered *before committees of Congress*. The power of the head of a Department to make regulations is limited to the business done *in* or by officers or agents of his Department; it does not extend to business transacted *elsewhere*. (Rev. Stats., 161.)

If the claim of Clift is to be regarded as one "finally adjudicated" under the relief act, then Kinney is the *only* person who presents any power of attorney *given since the act was passed*, or which gave authority to prosecute under that act, and he alone is authorized to receive the draft. A power of attorney may be given under which services may be rendered before a committee of Congress, and conferring authority to receive any draft to be issued after a relief act shall have been passed. But the power to Meguire evidently did not point to such services or such acts, but to services and claims under the act of July 25, 1866, (14 Stats., 364,) to which reference is made in the argument of his counsel.

In taking this view it must be held that Meguire presents no power of attorney which reaches the claim under the relief act. By its own terms his power is so restricted that it does not contemplate or look to a claim under *future legislation*. The *contract* with Meguire was for services "in the matter of obtaining certain moneys from the United States Government *due* them [Clift and others] severally *for wages*." Money *due* means money demandable by *existing law*.

The regulation does not in terms deny the right *existing by law* to revoke a power. It declares that "the claimant may *change his attorney* at any time with the consent of the proper officers of the Department." This manifestly relates to the right to *change an attorney* in the *prosecution* of a claim before the Department. (McAllister's case, *ante*, 167.) It is not dealing with the subject of the *revocation of a power*, and does not deny the right to revoke it. But if it should be construed as referring to revocation, it recognizes the right in saying that the change of attorney may be made "with the consent of the proper officers." It does not indicate who these officers are. The Treasurer and First Comptroller are the only officers charged by statute with a duty in relation to the payment of drafts and the settlement of the accounts for such payment. (Bender's case, 1 Lawrence, Compt. Dec., 317; Di Cesnola's case, *ante*, 142.)

The only clause of the "regulations" which can in any way apply in this case is the third, relating to "all cases" which are not otherwise provided for therein. This clause directs that the draft be delivered to the "proper attorney;" which means the attorney who, according to the principles of law, is entitled to receive it; and it is shown that Kinney is *the* attorney so authorized.

The "Navy Settlement Warrant No. 555," issued in favor of Clift, under the relief act of Congress, contains the words "Pay to William B. Clift, care J. F. Meguire, attorney, 116 D street, northwest, Washington, D. C." This indicates that the draft to be issued on the warrant should be delivered to Meguire. There is no statute specifically

regulating the subject of the delivery of drafts. The usage is to incorporate in the statement of an account, as made by each Auditor, a direction, in the form above, as to the delivery of the draft, and the direction is carried into the warrant. This usage may be controlled by a proper regulation of the Department. The First Comptroller is required to "countersign" all warrants "which shall be warranted by law." (Rev. Stats., 269; *McKee vs. U. S.*, 12 Ct. Cls., 553; *McKnight vs. U. S.*, 13 Ct. Cls., 307; s. c., 98 U. S., 179.) He cannot be required, by countersigning, to sanction, as to the delivery of a draft, a direction which is not warranted by law. No officer can be required, in the performance of a duty which, as the countersigning of a warrant, calls for the exercise of judgment and discretion to sanction a direction, or other proceeding collateral thereto, which, in his opinion, is unauthorized or illegal. This principle is especially applicable to all matters affecting the duty of the Treasurer of the United States as to the delivery of drafts and payment of warrants, because the First Comptroller is the only officer who is required to settle the accounts of the Treasurer and authorized to judge of the validity of the vouchers presented for payments made. This subject has been already discussed in *McAllister's case*, *ante*, 167.

The circular of July 19, 1880, says the "accounting officers will decide what persons as attorneys or claimants are entitled to receive drafts." The final accounting officer charged with a duty as to a warrant, in the form of that now under consideration, is the First Comptroller. It is of the utmost importance that there be *uniformity* in the rulings as to the delivery of drafts. Unless there be some one final authority to settle questions of law, uniformity cannot be secured.

If the regulation of December 18, 1872, in force while Meguire was rendering service in the Department, should control his rights, he can make no objection to a revocation of the power of attorney under which he acted. Other questions of law have been discussed by counsel which it is unnecessary to advert to.

It is very clear, from the law and principles applicable to the matter considered, that J. F. Kinney is entitled to receive the draft to be issued on the warrant in favor of Clift; and the Treasurer will be advised accordingly.*

TREASURY DEPARTMENT,

First Comptroller's Office, April 16, 1881.

* For information on the general subject considered in this case, the following regulations and circulars are appended:

TREASURY DEPARTMENT,
Second Comptroller's Office, April 25., 1867.

Upon consultation with the Auditors, whose work is subject to the revision of this office, the following has been adopted as the scale of fees to be allowed claim agents or attorneys for the collection of back pay, bounty, prize-money, or other moneys

due from the United States to persons who are or have been officers or enlisted men of the army, navy, or marine corps of the United States, or their heirs, except in cases of colored claimants, for the collection of whose claims the amount of fees is prescribed in section 2, act July 26, 1866, (14 Stats., 368,) and joint resolution No. 25, approved March 29, 1867, (15 Stats., 26,) viz:

For the preparation and prosecution of claims for, and the collection and remittance of, all sums not exceeding two hundred dollars, ten per centum; for all sums exceeding two hundred dollars, and less than eight hundred dollars, ten per centum on the first two hundred dollars, and five per centum on the remainder thereof, and for all sums of eight hundred dollars and upward, fifty dollars; and said fees shall include all expenses incident to the collection of said claims, except the expense of the necessary notarial or other acknowledgments, which shall be defrayed by the claimant; and any agent or attorney who shall charge, directly or indirectly, in any case, a greater sum for his services in preparing and prosecuting said claims, and collecting and remitting the amount due, shall be deemed guilty of malpractice, and upon satisfactory evidence of the fact of such overcharge being presented to the Second, Third, or Fourth Auditor, or to the Second Comptroller, said agent or attorney shall be suspended from the further prosecution of claims of any kind in or through any of the above-named offices.

J. M. BRODHEAD,
Comptroller.

Circular in relation to Powers of Attorney.

1872.
Department No. 53. }
Warrant Division No. 1. }

TREASURY DEPARTMENT, May 23, 1872.

The following abstract of the decision of the Comptrollers of the Treasury, in relation to powers of attorney, is published for the information of those concerned. The rules here laid down are adopted for the government of the officers of this Department:

The question as to whether or not a principal has the right to revoke the appointment of an attorney having been raised by the Third Auditor of the Treasury, the following is substantially the decision of the Comptrollers thereon, viz: The Auditors of the Department have no right to recognize the revocation of a power of attorney except upon charges of improper conduct; that their authority extends only to stating accounts and certifying them with the vouchers to the Comptrollers for decision. A power of attorney may be revoked at the pleasure of the principal under certain qualifications and limitations which affect the relation of principal and attorney.

Ordinarily, powers of attorney, without conditions, may be revoked at any time, yet the attorney may retain all deeds, papers, money, &c., belonging to the principal until his fees are paid.

Where an attorney has an interest in a claim—i. e., his fee is contingent upon his success—the attorneyship cannot be revoked.

The dissolution of a firm of attorneys does not relieve any member of the firm from his obligation to prosecute a claim, nor does the death of a member of a firm exonerate the survivors from their obligation to prosecute.

Powers of attorney executed before the issue of a warrant are not null and void, but are ineffectual for the purpose of collecting money; their validity in other respects is recognized by the Department and by the courts.

GEO. S. BOUTWELL,
Secretary.

1872.
Department No. 138. }
Warrant Division No. 3. }

TREASURY DEPARTMENT,
Washington, December 18, 1872.

Attorneys and agents doing business for others at the Treasury Department will understand that hereafter the Department will recognize the authority of the principal to revoke or annul any power of attorney that may have been given to such agent or attorney; and that the draft for the proceeds of any claim that may be allowed will be remitted or delivered to the principal unless he shall have given authority, in writing, for its delivery to an agent or attorney, which authority shall not have been annulled or impaired by any adverse act of the principal at the time when the draft may be ready for delivery.

This order does not interfere with the circular letter of the Second Comptroller, under date of April 25, 1867, and printed as "Form No. 4."

GEO. S. BOUTWELL,
Secretary.

Circular in relation to Powers of Attorney.

1874.
Department No. 16. }
Warrant Division No. 1. }

TREASURY DEPARTMENT,
Washington, March 19, 1874.

The order of this Department relating to powers of attorney, dated December 12, 1872, is hereby revoked, and the following order, issued May 23, 1872, is renewed, and will be in force from and after this date:

"The following abstract of the decision of the Comptrollers of the Treasury, in relation to powers of attorney, is published for the information of those concerned. The rules here laid down are adopted for the government of the officers of this Department:

"The question as to whether or not a principal has the right to revoke the appointment of an attorney having been raised by the Third Auditor of the Treasury, the following is substantially the decision of the Comptrollers thereon, viz: The Auditors of the Department have no right to recognize the revocation of a power of attorney except upon charges of improper conduct; that their authority extends only to stating accounts and certifying them with the vouchers to the Comptrollers for decision. A power of attorney may be revoked at the pleasure of the principal under certain qualifications and limitations which affect the relation of principal and attorney.

"Ordinarily, powers of attorney, without conditions, may be revoked at any time, yet the attorney may retain all deeds, papers, money, &c., belonging to the principal until his fees are paid.

"Where an attorney has an interest in a claim—i. e., his fee is contingent upon his success—the attorneyship cannot be revoked.

"The dissolution of a firm of attorneys does not relieve any member of the firm from his obligation to prosecute a claim, nor does the death of a member of a firm exonerate the survivors from their obligation to prosecute.

"Powers of attorney executed before the issue of a warrant are not null and void, but are ineffectual for the purpose of collecting money; their validity in other respects is recognized by the Department and by the courts."

WM. A. RICHARDSON,
Secretary.

Circular in relation to Powers of Attorney.

1875.
Department No. 45. }
Warrant Division No. 1. }

TREASURY DEPARTMENT, April 16, 1875.

The attention of officers of this Department, and of persons prosecuting claims before it, is called to section 3477 of the Revised Statutes, as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

The order of the Department of March 19, 1874, relating to powers of attorney, is hereby revoked, and the following adopted in lieu thereof:

The Treasury Department will hereafter recognize and act upon the rule of law, that to constitute a power coupled with an interest, there must be an interest in the thing itself, and not merely in that which is produced by the exercise of the power. *An interest in a claim to the extent of a fee contingent upon success, is not, therefore, such an interest as will prevent a principal from revoking a power.*

In all cases, drafts for the proceeds of claims will be made to the order of the claimant, and will be delivered to the claimant or to an attorney having the latest valid power authorizing him to receive it.

B. H. BRISTOW,
Secretary.

The last-quoted circular was revoked by the circular of October 10, 1876, referred to in the decision.

IN THE MATTER OF COMPENSATION FOR HOLIDAYS TO
PER DIEM GOVERNMENT EMPLOYÉS.—HOLIDAY CASE,
(SECOND.)

1. Under the joint resolution of Congress of March 3, 1881, employés of the Government in Washington are entitled to be paid the usual *per diem* compensation for the 4th of March and 30th of May, 1881, without being required to render service on either of those days.
2. If an employé on a *per diem* compensation *actually* perform service on either of those days by the order of the officer under whose direction he is, he is entitled to pay therefor, and to one day's pay additional, as for the holiday.
3. Statutes designed to secure to laborers and employés who are paid a *per diem* compensation equality of benefits with salaried officers and with employés compensated for fixed periods, are to be liberally construed.

TREASURY DEPARTMENT,
Office of the First Comptroller, April 18, 1881.

EDWARD CLARK, *Architect of the Capitol*:

SIR: Your letter of the 12th instant is received, asking me to give construction to the joint resolution of Congress approved March 3, 1881, which provides: "That *all* employés of the Government in the city of Washington shall be paid for the 4th day of March and the 30th day of May, 1881, as for the other days on which they perform labor."

You state that, owing to the low condition of the appropriation available for the balance of the fiscal year, the *per diem* men employed under your direction have been divided into two classes, one working the first half of the month and the other the latter half; that nearly all the men on duty on the first half of the month worked on the 4th of March, 1881, and were paid for that day's service; and you ask whether, under the joint resolution, the men who worked on the 4th of March, and were paid for their services on that day, are entitled to an extra day's pay.

It is clear that the object of this joint resolution was to give all employés of the Government in the city of Washington compensation for the 4th day of March, the day on which the President was inaugurated, without requiring any labor for that day, and to pay them precisely as for other days on which they performed labor; in other words, they were to have a holiday without labor, for which they were to be paid as if they had labored. Having actually labored, they are entitled to compensation for their labor, and they are also entitled to be paid one day's compensation for the same day as a holiday.

You further inquire whether those who were detailed for service for the latter portion of the month of March, whose names appear on the general pay-roll for that month, are entitled to payment for the 4th of said month as if they were actually employed on that day.

It is clear that it was not the purpose of this joint resolution to distinguish between or favor one class of laborers over and above another. It declares that "all" employés of the Government shall be paid for the 4th of March as on other days for which they performed labor, without requiring labor of them on that day. The persons who were on the pay-rolls for the entire month were on the 4th of March "*employés*" of the Government, within the meaning of this joint resolution, and are entitled to pay for the 4th of March as for a holiday.

This joint resolution is entitled to a *liberal construction* in favor of the employés named in it. All legislation looking to the interests of labor is to be liberally construed in favor of the laborer. (Sedgwick, Stat. and Const. L., 311; U. S. *vs.* Morse, 3 Story, C. C., 87.)

Most of the "employés" under your direction are engaged in *manual* labor. The joint resolution includes, however, not only those who perform manual labor, but all who "perform labor." This phraseology embraces all who *render service* for which they are entitled to *per diem* compensation. It does not embrace employés paid a fixed salary or compensation in gross for a year, month, or other prescribed period. Officers and employés entitled to a fixed salary, or compensation for a period of time including the 4th of March, are paid for such period, although they may not have been required to perform service on that day.

Those whose compensation is a *per diem*, to be paid only by reason of actual service, would, in the absence of the joint resolution, be less favored than the officers and other employés above mentioned. The joint resolution was designed to place all on the same footing as to receiving compensation for the 4th of March and Decoration day, May 30.

Vouchers of payments made according to the construction here given to the joint resolution of Congress, will be approved and allowed in the settlement, in this Department, of the accounts of the disbursing officer whose duty it is to make payments to said employés.*

Respectfully,

WILLIAM LAWRENCE,
First Comptroller.

TREASURY DEPARTMENT,

First Comptroller's Office, April 18, 1881.

*See Holiday Case, 1 Lawrence, Compt. Dec., 31.

IN THE MATTER OF PAYING INTEREST TO INTENDED BENEFICIARY ON BONDS HELD IN TRUST, UPON DEATH OF THE TRUSTEE, OR OF REQUIRING APPOINTMENT OF NEW TRUSTEE.—BOND-TRUST CASE.

1. If A hold a registered Government bond in trust for B, the interest on such bond cannot be paid to B upon the death of A.
2. In such case a successor in the trust should be appointed by the proper court.
3. It is competent to make a declaration of trust in the bond, or in a separate paper, by which the legal title and right to the payment of interest shall vest in the *cestui que trust* upon the death of the trustee.
4. Neither principal nor interest can be paid to a minor having the legal title to a bond. Payment should be made to a guardian.
5. It is competent, in creating a trust in a bond, to name or provide a mode of designating a successor in the trust in the event of the death of the trustee.

A gentleman in Philadelphia, who purposes to make an investment in bonds of the United States, and desires to obviate any difficulty which might arise in the future as to the payment of interest thereon to his intended beneficiary, asks, for his guidance, the decision of the Treasury Department on the following question, namely:

If I. N. purchase United States bonds and have them registered "I. N., trustee for A. N.," (his daughter,) to whom he wishes to give them on his death, will the interest be paid directly to A. N., on the death of I. N., without requiring any further proceedings than evidence of the death?

The inquiry is referred to the First Comptroller.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

In the case stated, I. N. would become a trustee for A. N. (2 Watson, Compend. Eq., 873; Sayre *vs.* Hughes, L. R., 5 Eq., 376; *Re De Visme*, 2 D. J. & S., 170.) Upon the death of I. N. there would be a vacancy in the office of trustee, and no payment of interest could be made until the court having jurisdiction had appointed a new trustee; or, by decree, terminated the trust. (Adams, Equity, 35; Snell, Princip. Eq., 335.)

It is assumed that the trustee holds, and has declared a purpose to hold, in special, as distinguished from *simple*, trust. (2 Watson, Compend. Eq., 859.)

It is a question how far the executors or administrators of a deceased trustee can execute the trust. (Perry, Trusts, 2d ed., sec. 343; Lewin, Trusts, 205; 2 Story, Eq. Jur., 11th ed., 1060, *n.*; 4 Kent, Com., 311; Hill, Trustees, 184, 326; 1 Sugd., Powers, 6th ed., 244; 1 Jarm., Wills,

638; *Marlow vs. Smith*, 2 P. Wms., 201; 16 Ves., 231; *Lomax, Ex. & Adm.*, Pt. 3, B. 1, ch. 3.)

The legal representative of a sole deceased trustee is charged with a duty as custodian until a successor in the trust is appointed and assumes the trust. (Hill, *Trustees*, 326; 1 Sugd. V. & P., 9th ed., 519.) He becomes a trustee *de facto*. (Watson, *Compend. Eq.*, ch. 4, "Trusts;" *Rackham vs. Siddall*, 16 Sim., 297; 1 Mac. & G., 607; *Hennessey vs. Bray*, 33 Beav., 96; *Knatchbull vs. Fearnhead*, 3 M. & C., 122; *Att'y-Gen. vs. Lady Downing*, Wilm., 21; *Amb.*, 550; *Att'y-Gen. vs. Stephens*, 3 M. & K., 347; *Pitt vs. Pelham*, 2 Fr., 134.)

The proper course is to have a trustee appointed. (Perry, *Trusts*, sec. 344; Hill, *Trustees*, 175, 190; *Hibbard vs. Lamb*, *Ambl.*, 309; *Hewett vs. Hewett*, 2 Eden, 332; *Amb.*, 208; *Att'y-Gen. vs. Clark*, 1 Beav., 467; *Drayson vs. Pocock*, 4 Sim., 283; *Finlay vs. Howard*, 2 Dr. & W., 490; *Devey vs. Pace*, *Taml.*, 77; *Blizzard vs. Filler*, 20 Ohio, 480; *Dunscumb vs. Dunscumb*, 2 Harr. & Mumf., 11; *Ridgley vs. Carey*, 4 Harr. & McHenry, 167.)

This is on the assumption that there is no written declaration of the purpose of the trust beyond that stated in the bonds, as indicated in the question submitted for decision.

It would be competent for I. N. to declare in the bonds, or in a separate written declaration of trust,* duly executed and acknowledged, that upon his death the absolute title in the bonds, with a right to the interest thereon, should vest in the *cestui que trust*, A. N. Trust estates are governed by the same rules of descent and devolution as legal estates, whatever the nature of the property may be. (*Trash vs. Wood*, 4 M. & C., 324.) In the case above stated the legal and equitable estate would both vest in A. N., and the equitable would merge in the legal estate. (*Wade vs. Paget*, 1 B. C. C., 363; *Philips vs. Brydges*, 3 Ves., 126; 4 Kent, Com., 311; 11 Paige, Ch., 314; Hill, *Trustees*, 326.)

If A. N. should be a minor when the entire estate vests in her, interest on her bonds could be paid until the age of majority to her guardian only. (*Waugh vs. Wyche*, 23 L. J. Ch., 823; *Furman vs.*

*The execution of a separate declaration of trust should conform to that for an assignment of a bond; for which see regulations relating to Government bonds in Appendix to 1 Lawrence, Compt. Dec., 566. For form of declaration of trust authorizing the *cestui que trust* to substitute new trustees in case of death of trustees or other cause, &c., see Hill, *Trustees*, 177 n.

It is said in Watson's *Compendium of Equity* (vol. 2, p. 860) that in England joint stock companies and the Bank of England recognize only the legal title; that is, the title of those whose names are entered in their books as the proprietors of shares or stock. But the court of chancery has jurisdiction to compel, if necessary, such companies or the bank to give effect to the equitable title. (See, also, *Pearson vs. Bank of England*, 2 B. C. C., 529; *Austin vs. Same*, 8 Ves., 522; *Lowry vs. Commercial and Farmers' Bank*, Tan. Dec., 310.)

Coe, 1 Caines' Cas., 96; Sparhawk *vs.* Buell, 9 Vt., 41; Dagley *vs.* Tolferry, 1 P. Wms., 285; Phillips *vs.* Paget, 2 Atk., 80; Davies *vs.* Austen, 3 Bro. Ch., 178; Lee *vs.* Brown, 1 Ves., 369; Overton *vs.* Bannister, 3 Hare, 503; Cory *vs.* Gertcken, 2 Mad., 40; Hoyt *vs.* Hilton, 2 Edw. Ch., 202; 2 Perry, Trusts, secs. 624, 921.)

The donor, I. N., could name in his declaration of trust a person to succeed himself; and, in the event of his death, to act as trustee until the *cestui que trust* should reach the age of majority, and could declare that the absolute title should then vest in her. (Hill, Trustees, 175; Lindlow *vs.* Fleetwood, 6 Sim., 152; Lampayo *vs.* Gould, 12 Sim., 426.)

The author of the trust is, comparatively speaking, unfettered in his selection of trustees. (Wilding *vs.* Bolder, 21 Beav., 222.)

A trust may be declared at an end, and the trustee discharged, by consent of the *cestuis que trust*, if they are *sui juris*; or without such consent, if the purposes of the trust be attained or terminated. (Perry, Trusts, 2d ed., secs. 920, 921.)

The inquiry presented is answered in the negative.

TREASURY DEPARTMENT,

First Comptroller's Office, April 19, 1881.

IN THE MATTER OF THE ASSIGNMENT OF QUARTERMASTERS' VOUCHERS.—DANA'S CASE.

1. Prior to July, 1878, quartermasters' vouchers duly receipted in blank by the claimants as paid, were, in practice in the Treasury Department, treated as assignable, and as passing by delivery to the holder, who was deemed *primâ facie* entitled to Treasury drafts in payment thereof.
2. This practice was in violation of section 3477 of the Revised Statutes, and of the general policy of the law.
3. The Treasurer cannot lawfully transmit to purchasers of claims against the United States, merely because of such purchases, drafts payable to the original claimants.
4. Power of attorney authorizing parties to receive drafts will, in proper cases, be respected.

In October, 1879, H. L. Dana and six other persons furnished the Government transportation for Indian prisoners in Montana, for which service they respectively received duly certified vouchers from an assistant quartermaster of the Army.

For the purpose of making sale of these vouchers, the parties in

whose favor they were respectively issued, signed a blank receipt, acknowledging payment thereof, and indorsed the vouchers in blank.*

Prior to July, 1878, such vouchers, so receipted and indorsed, were treated as negotiable; possession of them was deemed *prima facie* evidence of ownership; and they were, even without the blank indorsement, allowed by the accounting officers in favor of the holders, and so paid by the proper disbursing officers. (Lawrence and Crowell's case, 8 Ct. Cls., 252; Heathfield's case, *Id.*, 213.)

Since the decision in *U. S. vs. Gillis*, 95 U. S. Reports, 407, made in 1878, the practice has been to issue drafts in payment of such vouchers to the original claimants, and to transmit or deliver them to the parties who purchased the vouchers.

On February 21, 1881, Treasury drafts Nos. 12868 to 12873, inclusive, and No. 12878, were issued in favor of H. L. Dana and six other claimants, who furnished the transportation referred to in 1879; and the drafts were sent through the Quartermaster's department at Fort Ellis, Montana, to Story & Willson, of Bozeman, Montana, the purchasers of the vouchers.

On March 9, 1881, this firm addressed a letter to the Treasurer of the United States, saying that it would be a very difficult matter to find

*One of the vouchers is as follows:

FORM NO. 13.—VOUCHER TO ABSTRACT B.

THE UNITED STATES,

To H. L. DANA,

DR.

Place and date, Fort Ellis, M. T., October 21, 1879.	For hire of wagon and team for twenty-six (26) days, at \$6 per day..... Sept. 19 to Oct. 14, 1879, both dates inclusive.	\$156 00
---	--	----------

Hired in compliance with special order No. 196, dated Headquarters, Fort Ellis, M. T., September 18, 1879.

Copy hereto attached.

One copy retained in Indian Office.

[Stamp.]

E. SUBRY,
Examiner.

One hundred and fifty-six dollars, (\$156.00.)

I certify that the above account is correct and just; that the services were rendered as stated; that they were necessary for the public service, and are borne on my report of persons, &c., for the month of *October*, 1879.

JAS. N. ALLISON,
Lieut. 2d Cavalry, A. A. Q. M., U. S. A.

Received at ———, the ——— day of ———, 187—, of ———, quartermaster, U. S. Army, the sum of one hundred and fifty-six (156) dollars ——— cents, in full of the above account.

H. L. DANA.

Indorsed in blank thus:

"H. L. DANA,
STORY & WILLSON."

Approved: A. J. ALEXANDER,
Lieut. Col. 2d Cavalry, Commanding Post.

some of the original claimants, and expressing a fear that it "will be impossible" to find others; hence that the payees' indorsement of the drafts could not be obtained; and asking whether they might return to the Treasurer such of the drafts as they "cannot get properly indorsed, and have them exchanged for new ones," payable to their own order.

The Treasurer, on the 21st of March, 1881, referred this letter to the Second Auditor, who, on the 9th of April, referred it to the Secretary of the Treasury; the latter, on the 12th of April, referred it to the First Comptroller for decision.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The statute is so explicit in prohibiting the assignment of "any claim upon the United States, or any part or share thereof, or interest therein," until after the "issuing of a warrant for the payment thereof," that no discretion is left to executive officers to give the relief asked for in this case. (Rev. Stats., 3477; see also sec. 1778.) The policy of restraining or forbidding assignments pervades many provisions in the Revised Statutes. (Secs. 1291, 1576, 2106, 2263, 2414, 2436, 3963, 4536, 4643, 4745.)

The Supreme Court has decided in emphatic terms that the words of the statute, making "absolutely null and void" all assignments of claims, "embrace every claim against the United States, however arising, of whatever nature it may be, and wherever and whenever presented." (U. S. *vs.* Gillis, 95 U. S., 413; see U. S. *vs.* Robeson, 9 Pet., 319; Kendall's case, 7 Wall., 113; s. c., 7 Ct. Cls., 33; Safford's case, 1 Lawrence, Compt. Dec., 287; McKnight *vs.* U. S., 98 U. S., 186.)

It may be a hardship to the parties now asking relief that it cannot be granted; but executive officers cannot dispense with statutes or refuse to carry out their purpose. Congress alone can afford relief.

It should be understood that the Treasurer cannot lawfully transmit to purchasers of claims against the United States, merely because of such purchases, drafts payable to the original claimants. Powers of attorney authorizing parties to receive drafts will, in proper cases, be respected. (McAllister's case, *ante*, 167.) The application of Story & Willson must be refused.

TREASURY DEPARTMENT,

First Comptroller's Office, April 20, 1881.

IN THE MATTER OF THE AUTHORITY OF THE SECRETARY OF THE TREASURY TO MAKE AN ADDITIONAL ALLOWANCE TO DEPUTY COLLECTORS OF INTERNAL REVENUE AFTER THEY HAVE RENDERED THE SERVICES FOR WHICH THE FIRST ALLOWANCE WAS MADE.—WILSON'S CASE.

1. Construction given to the internal-revenue act of March 1, 1879. (20 Stats., 329.)
2. When the Secretary of the Treasury, on the recommendation of the Commissioner of Internal Revenue, has, as the statute authorizes, fixed the compensation to be paid to sundry deputy collectors in a district for a given fiscal year, and the deputies have performed their services under such regulation, any subsequent additional allowance for such services is prohibited by section 1765 of the Revised Statutes.
3. A deputy collector of internal revenue is a person whose salary is fixed by "regulations" within the meaning of section 1765 of the Revised Statutes.
4. The order made July 1, 1879, by the Secretary of the Treasury, fixing the allowances for deputy collectors in the second collection district of Georgia, is a "regulation."
5. The accounting officers of the Treasury Department are empowered to give authoritative construction to the "regulations" of the Department. The construction so given will be adhered to.
6. Extra or additional compensation cannot be allowed except by express authority of law, and an appropriation therefor. Congress has not delegated the discretion to make such allowance which itself may exercise consistently with public policy.
7. The act of March 1, 1879, by *expressly* authorizing the Secretary of the Treasury to make further allowances from time to time, as may be reasonable, for *collectors* of internal revenue, but omitting all mention of deputies, shows that such additional allowance to the latter was not contemplated, and is therefore not authorized.
8. Whether the authority to fix the compensation of deputies can, when once exercised, be subsequently modified so as prospectively to increase or reduce such compensation, considered.
9. When a deputy collector has rendered service under a regulation prescribing his compensation, there is no authority to reduce retroactively the rate of such compensation.

The Secretary of the Treasury, upon the recommendation of the Commissioner of Internal Revenue, and under the provision of section 12 of the act of March 1, 1879, (20 Stats., 329,) made for the fiscal year ending June 30, 1880, an allowance* at a fixed rate per annum, which prescribed the "salaries" to be paid to fifteen deputy collectors in the second district of Georgia as compensation for their services. The order making this allowance classified the salaries by rating them at

*See note on pages 210-212, *post*.

from \$900 up to \$1,250 per annum. Similar orders were made for all districts. On March 18, 1881, *after the services of the deputies were rendered*, the Secretary, on the Commissioner's recommendation, made an additional allowance for the same fiscal year and district, in the aggregate sum of \$405, "to increase the salaries" of W. T. B. Wilson and two other named deputies. The question now arises, whether the subsequent allowance can, on proper vouchers of payment to said deputies, be credited in the settlement of the collector's *disbursing account*.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The act of March 1, 1879, (20 Stats., 329,) provides—

"SEC. 12. That each collector of internal revenue shall be authorized to appoint, by an instrument in writing under his hand, as many deputies as he may think proper, to be *compensated for their services by such allowances as shall be made by the Secretary of the Treasury, upon the recommendation of the Commissioner of Internal Revenue*. Allowances shall also be made in like manner for *salary and office expenses of collectors*, all of which shall be in lieu of the salary and commissions heretofore provided by law." (See Rev. Stats., 3148.)

The same act provides as to *collectors*—

"SEC. 13. * * * That the Secretary of the Treasury, on the recommendation of the Commissioner of Internal Revenue, be authorized to make such further allowances, from time to time, as may be reasonable, in cases in which, from the territorial extent of the district, or from the amount of internal duties collected, it may seem just to make such allowances; but no such allowance shall be made if more than one year has elapsed since the close of the fiscal year in which the services were rendered." (20 Stats., 330; see Rev. Stats., 3145.)

The Revised Statutes provide that—

"No * * * person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation." (Sec. 1765; see 18 Stats., 109, sec. 3.)

If the rate of compensation is fixed by order of the Secretary *before service is performed*, and the deputy continues to act, his compensation becomes an agreed rate upon an express contract, and has all the features of a *salary* prescribed by law. If the service is performed before the Secretary makes an allowance of compensation therefor, there is, under the statute, an implied contract between the deputy and the United States for a *quantum meruit*. (U. S. *rs. Duval*, Gilp., 357; U. S. *vs. McCall*, *Id.*, 563; U. S. *vs. Wilkins*, 6 Wheat., 135, 142, 143;

U. S. *vs.* Ripley, 7 Pet., 18; U. S. *vs.* Eliason, 16 Pet., 291, 301, 302.) In such case it would be perfectly competent for the Secretary to allow reasonable compensation; but where an express contract is entered into, this method is inapplicable and the deputy cannot resort to a *quantum meruit*. (Clark *vs.* Smith, 14 Johns., 326; Champlin *vs.* Butler, 18 *Id.*, 169; Algeo *vs.* Algeo, 10 Serg. & R., 236; Jay County *vs.* Templer, 34 Ind., 322.)

The Secretary and the Commissioner have each properly treated the compensation of deputies as a matter of Treasury *regulations* under their statutory authority. The fixing of compensation for deputy collectors has been delegated to the Secretary of the Treasury by Congress, doubtless because of the impracticability, from the nature of the service to be performed in different parts of the United States, of prescribing by law a just, uniform, and settled rate. (Converse *vs.* U. S., 21 How., 463.) The "regulation" or order of the Secretary in such a case has the force of law; it should not be founded on arbitrary action, but upon principles of law; and it should therefore be, as nearly as possible, uniform in its operation. (U. S. *vs.* Macdaniel, 7 Pet., 13; U. S. *vs.* Ripley, *Id.*, 25, 26.) After the compensation of a deputy collector has been once fixed by such order or *regulation*, and services have been rendered under it, no subsequent order or regulation can operate retrospectively to change the previous rate of compensation. All these orders are subject to the same rules of construction as are applicable to statutes. When an officer or other person in the public service has performed his duties under an agreed rate of compensation, he has not, under the law of contracts, any claim for additional compensation; and when the salary or other compensation has been fixed by law or regulations, no additional compensation can be allowed "unless expressly authorized by law." (Rev. Stats., 1764; U. S. *vs.* Smith, 1 Bond, 68; Jay County *vs.* Templer, 34 Ind., 322; 9 Op. Att.-Gen., 98; Patton's case, 7 Ct. Cls., 362.) The Secretary of the Treasury fixed, by an order of July 1, 1879, the compensation severally of the deputies of the second district of Georgia for the then current fiscal year. Such deputies are "persons" in the "public service whose * * * pay, or emoluments are fixed by * * * regulations." (Rev. Stats., 1765.)

The order of the Secretary fixing a salary is a "regulation" within the meaning of section 1765 of the Revised Statutes. (Herndon's case, 1 Lawrence, Compt. Dec., 55.) It is part of a series of orders, all made at the same time, regulating the compensation of all deputy collectors of internal revenue. This has in effect already been decided. The accounting officers of the Treasury Department are empowered to

give authoritative construction to the regulations of the Department. The construction so given will be adhered to. (*Landram vs. U. S.*, 16 Ct. Cls., 74)

The deputy collector in this case is therefore within the prohibition of section 1765. No statute has appropriated or expressly authorized any additional allowance to deputies serving under a salary or other fixed rate of compensation. The legislation which prohibits extra compensation was intended "to *prevent* and suppress the growing evil of extra compensation claimed for services purely incidental to a single office." (*Story, J.*, in *U. S. vs. Morse*, 3 St., 87.) The Revised Statutes have extended the prohibition to the case of persons employed in the public service who are not, in strict legal *parlance*, officers. In prescribing a salary for an office, Congress ascertains the responsibilities attaching, and the nature and extent of the duties incident thereto, as the basis upon which to fix the compensation. The Secretary of the Treasury is presumed to follow the same rule in regard to salaries which he prescribes by regulations made pursuant to law. In both cases the matter of extra or additional compensation is left discretionary with Congress. (1.) It cannot be allowed except by express authority of law, and an appropriation therefor. (2.) It is against well-defined public policy, and Congress has not delegated the discretion to allow it which itself may exercise consistently with public policy. (3.) The delegation of power to fix or prescribe a salary or compensation for official or *quasi*-official services does not, in face of the express prohibition of law and the opposition of public policy, carry with it an implied power to give additional compensation for such services, even though it could be shown, after service performed, that the rate allowed was not sufficient. (4.) The act of March 1, 1879, by *expressly* authorizing the Secretary to make further allowances from time to time, as may be reasonable, for *collectors*, but omitting all mention of deputies, shows that such additional allowance to the latter was not contemplated, and is therefore not authorized. *Expressio unius est exclusio alterius*. It is not intended to decide that an order may not be made *prospectively* to increase or reduce the salary of a deputy after he has commenced to act under an allowance fixing his compensation. This would probably be sometimes found just and proper. It is not necessary now to decide whether the power to fix the compensation is, when once exercised, *functus officio*. (Receiver's case, (second,) *ante*, 127.)

The Secretary of the Treasury cannot make an increase of compensation *retroactive*; for this would be, in effect, additional pay or extra

allowance, which no officer or person in the public service is permitted to receive unless it be authorized by law, and appropriation be made explicitly for it. (Rev. Stats., 1765.)

Speaking of the authority of the heads of Departments to make regulations and of the usage thereunder, the Supreme Court in *U. S. vs. Macdaniel*, (7 Pet., 15,) said: "No change of such usage can have a retrospective effect, but must be limited to the future." When the Secretary of the Treasury makes a special allowance prescribing the compensation of a deputy collector for a current year, he cannot, *after service performed*, reduce the rate of compensation. (*Patton vs. U. S.*, 7 Ct. Cls., 362.) His authority in such case is *functus officio*. The same principle will apply to a retroactive increase of the rate; of which the statutory prohibition is also clear and absolute, except upon the conditions named. The statute operates as an express limitation of the power granted to the Secretary. (*Russell vs. Wheeler, Hemp.*, 3.) No inference in favor of a power in the head of a Department to allow additional compensation can be deduced from the practice of making retroactive allowances for *expenses* incurred in discharging the duties of an office, because there is, as to such allowances, no statutory prohibition; and in such cases where the original expense-allowance is not sufficient to reimburse the employé for his actual and necessary outlay, or for the service required or accepted by the Government, there is an implied agreement to make the allowance sufficient, and the reason of the law against extra compensation does not apply; but the reason and terms alike apply to restrain executive officers from increasing official compensation where the rate has been fixed by law or regulations. (*Converse vs. U. S.*, 21 How., 469, 473, 477.)

The additional compensation to Wilson and the other two deputies will be disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, April 21, 1881.

NOTE.—The allowance referred to on page 206, *ante*, was as follows:

TREASURY DEPARTMENT,

Office of Internal Revenue, Washington, June 30, 1879.

Hon. JOHN SHERMAN, *Secretary of the Treasury*:

SIR: I have the honor to recommend that a special allowance, at the rate of twenty-seven thousand five hundred and twenty dollars (\$27,520) per annum, be granted to the collector of the second district of Georgia for the fiscal year ending June 30, 1880,

Additional Allowance to Deputy Collectors, &c.—Wilson's Case. 211

for salaries and expenses of collector and deputy collectors, to be paid in equal monthly instalments, and to be applied by him as follows:

	Salary per annum each.	Travelling expenses per annum each.	
For 1 deputy.....	\$1, 250	\$275	\$1, 525
For 1 deputy.....	1, 175	175	1, 350
For 7 deputies.....	1, 050	350	9, 800
For 1 deputy.....	1, 050	350	1, 400
For 1 deputy.....	1, 050	300	1, 350
For 2 deputies.....	900	300	2, 400
For 1 deputy.....	900	350	1, 250
For 1 deputy.....	1, 250	450	1, 700
For 1 clerk.....	1, 500	.....	1, 500
For 1 clerk.....	1, 150	.....	1, 150
For compensation of collector.....	.....	.....	3, 500
For rent of office.....	.....	.....	520
For fuel and lights.....	.....	.....	75
Total per annum.....	.....	.....	27, 520

Provided the disbursements under the above allowance shall be sustained by proper vouchers. Form 634, properly made out and executed, will be regarded as a sufficient voucher for salary and travelling expenses of deputy collectors.

Estimated collections for the fiscal year covered by this recommendation, \$225,000. The allowance recommended herein for compensation of the collector is based upon the following scale of collections, and, should the collections vary from the amount estimated, his compensation will be adjusted at the end of the fiscal year in accordance with said scale:

Scale of Compensation of Collectors under Special Allowance.

For collection of—

\$25, 000 or less.....	\$2, 000
25, 000 to \$37, 500.....	2, 125
37, 500 to 50, 000.....	2, 250
50, 000 to 75, 000.....	2, 375
75, 000 to 100, 000.....	2, 500
100, 000 to 125, 000.....	2, 625
125, 000 to 175, 000.....	2, 750
175, 000 to 225, 000.....	2, 875
225, 000 to 275, 000.....	3, 000
275, 000 to 325, 000.....	3, 125
325, 000 to 375, 000.....	3, 250
375, 000 to 425, 000.....	3, 375
425, 000 to 475, 000.....	3, 500
475, 000 to 550, 000.....	3, 625
550, 000 to 625, 000.....	3, 750
625, 000 to 700, 000.....	3, 875
700, 000 to 775, 000.....	4, 000
775, 000 to 850, 000.....	4, 125
850, 000 to 925, 000.....	4, 250
925, 000 to 1, 000, 000.....	4, 375
1, 000, 000 and upward.....	4, 500

Five hundred dollars of the amount herein recommended as personal compensation of collector is added to the salary fixed in the above scale in consideration of the territorial extent of said district.

Very respectfully,

GREEN B. RAUM,
Commissioner.

[Indorsements.]

TREASURY DEPARTMENT,
Office of Internal Revenue, June 30, 1879.

GREEN B. RAUM,
Commissioner.

Recommends special allowance at the rate of \$27,520 to the collector of the second district of Georgia, from July 1, 1879, to June 30, 1880.

TREASURY DEPARTMENT, *July 1, 1879.*

The special allowance herein recommended is hereby granted.

JOHN SHERMAN,
Secretary.

Recorded, vol. 1, page 490.

OFFICE OF INTERNAL REVENUE, *July 9, 1879.*

Recorded, vol. C, page 133.

OFFICE OF FIRST COMPTROLLER, *July 21, 1879.*

Recorded, vol. 7, page 93.

OFFICE OF FIFTH AUDITOR, *October 9, 1879.*

**IN THE MATTER OF THE RIGHT OF A DEPUTY COLLECTOR
OF INTERNAL REVENUE TO HOLD ALSO THE POSITION OF
INSPECTOR OF TOBACCO AND CIGARS, AND RECEIVE THE
COMPENSATION ATTACHING TO BOTH PLACES.—YATES'S
CASE.**

1. No one person can lawfully receive the compensation both of a deputy collector of internal revenue and an inspector of tobacco and cigars.
2. Construction given to section 1765 and 3151 of the Revised Statutes.
3. An inspector of tobacco and cigars who is entitled to receive compensation from the owner or manufacturer of the articles inspected, is not entitled to receive compensation for services as deputy collector.

April 2, 1881, the collector of internal revenue for the sixth Kentucky district addressed a letter to the Commissioner of Internal Revenue, asking if Deputy Collector Yates, who is also an inspector of tobacco and cigars, can receive the compensation authorized by law for both of these positions. (He refers to *Landram vs. U. S.*, 16 Ct. Cls., 74, and *Hedrick vs. U. S.*, *Id.*, 88.)

April 6, 1881, this letter was referred, for advice in the matter, by the Commissioner to the First Comptroller, whose attention was called "to the fact that the fees of an inspector of tobacco and cigars are paid, not by the United States, but by the owner of or manufacturer of the articles inspected." (Rev. Stats., 3151.)

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

The act of March 1, 1879, (20 Stats., 329,) provides—

"That each collector of internal revenue shall be authorized to appoint, by an instrument in writing under his hand, as many deputies

as he may think proper, to be compensated for their services by such *allowances as shall be made by the Secretary of the Treasury*, upon the recommendation of the Commissioner of Internal Revenue." (Sec. 12.)

The law provides that (1) "there shall be appointed by the Secretary of the Treasury, in every collection district where the same may be necessary, one or more *inspectors of * * * tobacco, cigars * * ** who shall be entitled to *receive such fees as*" the Commissioner of Internal Revenue may prescribe, "to be paid by the owner or manufacturer of the articles inspected," (13 Stats., 244, sec. 58; R. S., 3151;) and that (2) "No officer * * * or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, * * * for any * * * service or duty whatever * * *." (Rev. Stats., 1765; see also 18 Stats., 109, sec. 3.)

The inspector, being appointed by the head of an executive department, is an officer; the deputy collector is *not* technically an officer.

It is, therefore, clear that no one person can lawfully receive the compensation both of a deputy collector and of an inspector of tobacco and cigars. (*Hoyt vs. U. S.*, 10 How., 141.)

The prohibition against *double compensation* in section 1765 of the Revised Statutes is not affected by the fact that the fees of inspectors are to be paid by the owner or manufacturer of the tobacco or cigars inspected. It is against double compensation "*in any form whatever.*" Its purpose is to protect the Treasury, and to prevent a multiplication of emoluments and favors to one person. Fees paid by the owner or manufacturer constitute compensation in *one* form. The prohibition applies to every officer or person whose compensation is *fixed* by law or regulations. The compensation of deputy collectors of internal revenue is *fixed* "by such *allowances as shall be made by the Secretary of the Treasury.*" (*Wilson's case*, ante, 206.) The inspector is "entitled to receive such fees" as the Commissioner of Internal Revenue "may *prescribe.*" There is, in the execution of this provision, no uniformity in the charges imposed upon the manufacturers. In some districts, or parts of districts, the fee is at the rate of ten cents per hundred pounds of the tobacco inspected; while in others the rate is much higher. This inequality is due to the distance to be travelled by the inspecting officer, or the quantity of tobacco to be inspected, or to both. In order that the fees to be paid by the manufacturer shall be sufficient to cover the necessary travelling expenses of the officer, and withal afford a reasonable compensation, it is the practice, rendered unavoidable by the terms of the statute, to impose upon the manufacturer whose tobacco

is at a place remote from the office of the inspector, or who has but a small quantity to be inspected, a higher rate than that imposed upon the manufacturer whose tobacco is near the inspector's office, or who has a large quantity to be inspected. This imposition of a discriminating tax against the small or remotely-situated manufacturer was probably not foreseen by Congress. Such an amendment of the law as would fix a uniform rate of inspection fee, to be collected and paid without deduction into the Treasury, and as would constitute the proceeds a general fund for the compensation of all the inspectors, would seem to be an appropriate remedy for the injustice; still leaving to the discretion of the Commissioner the amount of compensation to be paid to each inspector.

The order by which an *allowance* of compensation is made by the Secretary to a deputy collector is a "regulation." It is so in view of the *purpose* of section 1765, and of the fact that the Secretary classifies the deputies and prescribes rules affecting whole classes. The order of the Commissioner, by which the fees of inspectors are prescribed, in the same manner, is a "regulation." This was decided in effect in Herndon's case, 1 Lawrence, Compt. Dec., 55, which is affirmed in Wilson's case, *ante*, 206. This ruling is made in full view of all that is said in Landram *vs.* U. S., 16 Ct. Cls., 74, and in Hedrick *vs.* U. S., *Id.*, 88.

It might with some force be said, and especially in view of the *purpose* of section 1765, that the compensation of a deputy collector, as also of an inspector, is "fixed by law;" but it is not necessary to decide this now. The *statute* does not, in terms, fix any amount; but it gives authority to officers who do fix the amount. The compensation is thus, in one sense, "fixed by law," because in pursuance of law. To hold otherwise, as to officers, would defeat the whole policy of the statute. *Qui hæret in litera, hæret in cortice.*

If the same person who is deputy collector holds an appointment as inspector, he is entitled to the fees of the latter position, and cannot be lawfully paid compensation as deputy collector. If he shall serve as inspector *gratis*, he cannot thereby charge the United States with a liability for his compensation as deputy collector. The statute is designed as well to *protect the Treasury* as to prohibit every person in Government service from receiving any addition to his prescribed compensation, "*in any form whatever.*" The Commissioner of Internal Revenue is advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, April 22, 1881.

IN THE MATTER OF CIRCUIT COURT COMMISSIONERS' FEES IN ELECTION CASES.—ALLEN'S CASE.

1. Section 1014 of the Revised Statutes requires, in the arrest, imprisonment, and bail of offenders against the United States, the adoption of the State statutes in force where such offenders are found, only in so far as those statutes regulate forms of procedure and process not otherwise provided for under the authority of the United States.
2. In election cases, commissioners of the circuit courts are not permitted to retain complaints, examinations, or records made before or by them, or oaths of officers taken before them; but are required to forward them to the proper chief supervisor of elections, to be by him filed and preserved.
3. The commissioners are not authorized to make records or copies of any of these for chief supervisors, and, hence, cannot be allowed fees for making the same.
4. The commissioners are not entitled to fees for affixing seals to oaths of office.

The material facts are as follows:

John J. Allen was, from July 1 to December 31, 1878, a commissioner of the circuit court of the United States for the eastern district of New York, second circuit, and was also chief supervisor of elections of that judicial district. (Rev. Stats., 627, 727, 846, 847, 856, 945, 981, 984, 1014, 1042, 1778, 1982, 1987, 2025, 2026, 3462, 4079, 4080, 4081, 5003, 5076, 5270, 5271, 5280, 5296, 5446.) He has rendered an account claiming, as commissioner, fees for making records of proceedings, including complaints, and certifying the same to himself as chief supervisor; for "affixing commissioner's seal to the oaths of office of special deputy marshals and supervisors of elections," and "for filing the oaths," in numerous cases of violations of the election laws. (Rev. Stats., title XXVI.)

The question, whether the fees so charged can be allowed, arises in the settlement of Mr. Allen's account.

The commissioner, in person, and his attorney, *A. J. Falls*, made oral arguments:

The "record" is a statement or *docket* showing the proceedings in brief in each case. No charge is made for the original records; the charge is only for making the *copies*.

The Revised Statutes, sections 1756, 1757, and 1758, require oaths. Section 1778 requires such oaths to be certified *under seal*; and section 828 authorizes a fee of twenty cents for affixing the seal.

Fees are chargeable for filing the oaths of office of the supervisors and deputy marshals under sections 828 and 2027.

The chief supervisor is also entitled, under section 2031, to a fee for filing the *same* oaths.

Section 1014, directing that proceedings in criminal arrests, &c., in any State, before judges or commissioners, be conducted "agreeably to the usual mode of process against offenders in such State," adopts the State statute, which requires the commissioner to keep in his own

custody the original complaints, examinations, and records. The statute of New York referred to is as follows:

"Whenever any magistrate having criminal jurisdiction shall take any deposition, affidavit, or complaint in writing, upon which he shall issue any criminal warrant, search warrant, or other criminal process, he shall *file and preserve the same*, and on the demand of any person affected by the said warrant, search warrant, or other process, he shall exhibit the said deposition, affidavit, or complaint to such person for his perusal, and such person, by himself or by another, may take a copy thereof."

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The Revised Statutes of the United States provide:

"SEC. 1014. For any crime or offense against the United States, the offender may, * * * by any commissioner of a circuit court to take bail, or by any * * * magistrate, of any State where he may be found, *and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.* Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case." (U. S. *vs.* Rundlett, 2 Curt., C. C., 45; U. S. *vs.* Horton, 1 Green, Crim. Rep., 431; s. c., 2 Dillon, C. C., 94.)

Section 2027 provides that—

"All United States marshals and commissioners who in any judicial district perform any duties under the preceding provisions relating to, concerning, or affecting the election of Representatives or Delegates in the Congress of the United States, from time to time, and, with all due diligence, *shall forward to the chief supervisor in and for their judicial district, all complaints, examinations, and records pertaining thereto, and all oaths of office by them administered to any supervisor of election or special deputy marshal, in order that the same may be properly preserved and filed.*"

The fees of the commissioner are regulated by section 847, as follows:

"For administering an oath, ten cents.

"For taking an acknowledgment, twenty-five cents.

"For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed.

"For attending to a reference in a litigated matter, in a civil cause at law, in equity, or in admiralty, in pursuance of an order of the court, three dollars a day.

"For taking and certifying depositions to file, twenty cents for each folio.

"For each copy of the same furnished to a party on request, ten cents for each folio.

"For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services. * * *

Section 828, regulating clerks' fees, allows—

"For a copy of any entry or record or of any paper on file, for each folio, ten cents."

Section 1778 authorizes the commissioner to use a seal of office for the purposes therein prescribed.

The statute of New York, cited in argument, requires committing magistrates in criminal cases to "file and preserve" all "depositions, affidavits, or complaints." It seems to be supposed that section 1014 of the Revised Statutes of the United States so far adopts the State statute as to require a commissioner, under the election statutes, also to file and preserve similar papers in his own custody. This is a mistake. The State statute is only adopted in respect to "the usual mode of process." This includes something more than what is technically "process;" it includes forms and practice so far as applicable and not otherwise provided for by the statute or common-law usages under the authority of the United States.

The commissioner is not required, or even permitted, to retain complaints, examinations, records, or oaths of office; but is required by section 2027 of the Revised Statutes to forward them to the chief supervisor, "in order that the same may be properly preserved and filed" by *him* in his office; and this section cannot be controlled by the statute of New York. The commissioner in this case is also the chief supervisor; but he is in each position or capacity to be considered as a separate, distinct officer, and is, as commissioner, to "forward" to himself, as chief supervisor, the *original* "complaints, examinations, records, * * * and all oaths of office. * * *"

The commissioner is not authorized to make records or *copies* of any of these; nor is it necessary for the purpose stated; and, hence, he cannot be allowed fees for making the same. He is not, as commissioner, required to "*file*" any of these papers, and cannot be allowed fees for doing so.

The originals are to "be properly preserved and filed" by the chief supervisor to whom they are "forwarded." The commissioner is not entitled to fees for affixing a seal to oaths of office. Section 1778 of the Revised Statutes does not authorize the commissioner to use a seal as to the matters now under consideration. (*Muirhead vs. U. S.*, 13 Ct. Cls., 256.)

The account of Mr. Allen for the services enumerated is disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, April 23, 1881.

IN THE MATTER OF REMAINING EXECUTOR'S AUTHORITY TO CONTRACT FOR CONTINUANCE OF CALLED BONDS.— BOND-CONTINUANCE CASE.

1. An executor has no authority by virtue of his office, and in the absence of specific directions in the will under which he acts, to agree with the United States to extend the time for paying Government bonds which have been called in for redemption.
2. A will may vest in the persons who are executors under it duties as *trustees* which are distinct from those incumbent on them in their character as *executors*.
3. The acts of one of two executors, not dissented from by the other, in respect of the *administration of the effects*, as distinct from the making of general contracts, will, at common law, ordinarily bind both.
4. A *naked* power, given to two or more trustees in ordinary trusts, must generally be executed by all of the trustees.
5. If one of several co-trustees become insane, his place must be supplied by the proper court, or in some other authorized manner, in order to the execution of the trust.
6. If a co-executor become *non compos*, the proper court may, on account of the disability, remove him from office, and either confer the executorial power upon the competent executors or testamentary trustees, or else appoint another in his stead.
7. If a naked power be given to "trustees," even *nominatim*, yet in their *official* character as "the trustees," the survivors or survivor of them may execute it, because it is annexed to the office, or to the trustees *ratione officii*.
8. Where, however, a mere *discretionary* power, or one simply collateral, has been given to several persons *expressly by name, and to them only*, all the individuals named must join in exercising it; and if one or more of such persons disclaim, the power cannot be validly executed by those only who have accepted the trust.
9. A trustee who has once acted in or accepted the trust, and has not been properly discharged from it, must, in the execution of the trust, join the other trustees, and it is immaterial that he has parted with the possession of the legal estate.
10. If a power be coupled with an interest, the authority to execute it is generally held to survive; nor will the power of an executor be determined by the death of his co-executors, but will survive to him; and where the power to executors to sell arises by implication, the power to the survivor to sell will arise in the same way.
11. Where trustees have the legal title to trust property, and so an authority coupled with an interest, the office of trustee is "impressed with the quality of survivorship."

The assistant treasurer of the United States at Philadelphia, under date of April 18, 1881, states, on behalf of the executor of the last will and testament of a deceased party, that one of two executors has become

insane, and the remaining executor desires to continue on interest at three and one-half per centum per annum, under Treasury Department circular No. 42,* a registered bond, formerly held by the testator,

*The circular is as follows:

Circular.—One Hundred and Second Call, with Provision for Continuance of the Bonds.

1881.
DEPARTMENT No. 42. }
Secretary's Office.

TREASURY DEPARTMENT,
Washington, D. C., April 11, 1881.

By virtue of the authority conferred by law upon the Secretary of the Treasury, notice is hereby given that the principal and accrued interest of the bonds herein-below designated will be paid at the Treasury of the United States, in the city of Washington, D. C., on the first day of July, 1881, and that the interest on said bonds will cease on that day: provided, however, that in case any of the holders of the said bonds shall request to have their bonds continued during the pleasure of the Government, with interest at the rate of three and one-half per centum per annum, in lieu of their payment at the date above specified, such request will be granted if the bonds are received by the Secretary of the Treasury for that purpose on or before the tenth day of May, 1881, viz:

SIX PER CENT. BONDS, ACTS OF JULY 17 AND AUGUST 5, 1861.

Coupon bonds.....	\$30,706,050
Registered bonds.....	109,838,600
Total.....	<u>140,544,650</u>

SIX PER CENT. BONDS OF THE ACT OF MARCH 3, 1863.*

Coupon bonds.....	\$9,545,500
Registered bonds.....	45,600,250
Total.....	<u>55,145,750</u>

aggregating \$195,690,400, and being the entire amount issued under the above-mentioned acts which remains outstanding.

The request above mentioned should be in form substantially as herewith prescribed; and upon the surrender of the bonds, with such request, the Secretary of Treasury will return to the owners registered bonds of the same loan, with the fact that such bonds are continued during the pleasure of the Government, with interest at the rate of $3\frac{1}{2}$ per cent. per annum, stamped upon them in accordance with this notice.

Upon the receipt of bonds to be continued as above provided, the interest thereon to July 1, 1881, will be prepaid at the rate the bonds now bear, and after that date the semi-annual payments of interest on the continued bonds will be made by checks from the Department, as in the case of other registered loans.

All bonds, whether intended for payment or to be continued, should be forwarded to the "Secretary of the Treasury, Loan Division," with a letter of transmission, setting forth the purpose for which they are transmitted, and, if to be continued, they must also be accompanied by the request above referred to.

Registered bonds for redemption or to be continued should be assigned to the Secretary of the Treasury for redemption or continuance, as the case may be, and when parties desire checks in payment of registered bonds to be drawn to the order of any one but the payee, they should assign them to the "Secretary of the Treasury for redemption on account of" [here insert name or names of persons to whose order the check is to be made payable.]

The Department will pay no expense of transportation on bonds received under the provisions of this circular, but the bonds returned will be sent by prepaid registered mail unless the owners otherwise direct.

WILLIAM WINDOM.
Secretary.

of one of the classes described in the circular; and the assistant treasurer inquires whether this can be done on the application of the one sane executor.

The terms of the will are not stated.

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

It is the duty of an executor to make such disposition of the personal estate of the testator as the will under which he acts may direct; subject, however, to the rights of creditors of the estate, as fixed by law. If no direction be given in the will, it is the duty of the executor to collect and receive payment of, *e. g.*, a government bond, as in this case, which has been called in for redemption, and to apply the proceeds as the law may require. (1 Wms., Ex'rs, 6th Am. ed., [361] note *p*; [630.] note *e*; 2 *Id.*, [986;] *Echels vs. Barrett*, 6 Ga., 443; *Helme vs. Sanders*, 3 Hawks, 566; *Hagthorp vs. Hook*, 1 Gill & J., 270.)

Unless authority be given in the will, or by direction of a competent court of equity or probate, the executor has no authority to continue the bond under the Treasury circular. (1 Wms. Ex'rs, [361,] [630;] 2 *Id.*, [986;] *Att'y-Gen'l vs. Brickdale*, 8 Beav., 223; *Ex parte Smith*, 1 Dea., 385; *M. & A.*, 506; *Ex parte Phillips*, 2 Dea., 334.) A will may vest in the persons who are executors under it duties as *trustees* which are distinct from those incumbent on them in their character as executors. (*Gaudolfo vs. Walker*, 15 Ohio St. R., 273.) If the executors are (1) as *such*, by the terms of the will, or (2) by the decree of a court, or (3) as *trustees*, independently of their character as executors, given such power as would authorize them to enter into a contract for the contin-

Form of Request for Continuance of Bonds.

[DATE.] ———.

To the SECRETARY OF THE TREASURY:

Under the terms of the circular No. 42, issued by the Secretary of the Treasury, April 11, 1881, —, the undersigned, owner— of the below-described United States six-per-centum bond—, hereby request— that — payment be deferred, and that — be continued during the pleasure of the Government, to bear interest at the rate of three and one-half per centum per annum from July 1, 1881, as provided in said circular; and, in consideration of the premises, — hereby waive— and release— all right to, or claim for, any interest on said bond— in excess of three and one-half per centum per annum on and after said date of July 1, 1881; and in witness thereof — have hereunto set — hand— and seal— this day.

(Here describe the bonds, stating whether registered or coupon, giving date of authorizing act, denomination, serial numbers, and amounts.)

[Signature and P. O. address.]

—————, [SEAL.]

NOTE.—The seal should be of wafer or wax, if not executed by a corporation. In case the above request is signed by an officer of a bank or other corporation, it should be accompanied by the usual resolution authorizing such officer to act for the institution. The form of request, prepared in blank for use, will be furnished upon application to the Secretary of the Treasury.

nance of the bond, the power should be shown by a certified copy of the will or of the decree of the court. If the terms of the will or decree authorize one executor or trustee to act in the case stated, this authority should be shown in the same mode. If it be assumed that there is authority lodged by the terms of the will or by judicial decree in both executors, either as *such* or as *trustees*, which is broad enough in terms to justify a contract by them with the Government for the continuance of the bond upon the conditions proposed by the Secretary of the Treasury, then the question arises whether this authority remains unimpaired in the one sane executor, so as to enable him to contract with the United States for such continuance of the bond. When there are two *executors*, the acts of one from which the other does not dissent, in respect of the *administration of the effects* of an estate, as distinct from making *general contracts*, will, at common law, ordinarily bind both. (2 Wms. Ex'rs, [946,] *et seq.*; Edmonds *vs.* Crenshaw, 14 Pet., 166; 3 Bac. Abr., 30, tit. "Executors," C. 1, D. 1; Shep. Touchst., 484; Wentw. Off. Ex., 14th ed., 206, 213; *Ex parte* Rigby, 19 Ves., 462; Lank *vs.* Kinder, 4 Harring., 457; Jackson *vs.* Shaffer, 11 Johns., 513; Kerr *vs.* Waters, 19 Ga., 136; Wilkerson *vs.* Wootten, 28 Ga., 568; Wheeler *vs.* Wheeler, 9 Cowen, 34; Stewart *vs.* Conner, 9 Ala., 803; Owen *vs.* Owen, 1 Atk., 495; People *vs.* Keyser, 28 N. Y. 226; 1 Roll. Abr., 618, 924, Devise, B., Ex. Off.; Com. Dig. Administration, B. 12; Puff *vs.* Kinney, 1 Bradf. Sur. 1; Shaw *vs.* Berry, 35 Maine, 279; Gilman *vs.* Healy, 55 Id., 120; Bodley *vs.* McKinney, 9 Sm. & M., 339; Gage *vs.* Johnson, 1 McCord, 492; Bryan *vs.* Thompson, 7 J. J. Marsh., 587; Shreve *vs.* Joyce, 7 Vroom, 48; Bogert *vs.* Hertell, 4 Hill, 492; 9 Paige, 52; Stuyvesant *vs.* Hall, 2 Barb. Ch., 151; Murray *vs.* Blatchford, 1 Wend., 583; Jackson *vs.* Robinson, 4 Id., 436; Douglass *vs.* Satterlee, 11 Johns., 16; Hall *vs.* Carter, 8 Ga., 388; Chew's Estate, 2 Parsons, Sel. Cas., 153; Wood *vs.* Brown, 34 N. Y., 337; Jacomb *vs.* Hardwood, 2 Ves., sr., 267; Devling *vs.* Little, 26 Pa. St., 502; Hoke *vs.* Fleming, 10 Ired. L., 26; Weir *vs.* Mosher, 19 Wis., 311; Son *vs.* Miner, 37 Barb., 466; Smith *vs.* Everett, 27 Beav., 446; Simpson *vs.* Gutteridge, 1 Madd., 616; Murrell *vs.* Cox, 2 Vern., 570; Dwight *vs.* Newell, 15 Ill., 333; Lepard *vs.* Vernon, 2 Ves. & B., 54; Cole *vs.* Miles, 10 Hare, 179.) One executor is not the agent of the others so as to bind them by his several contracts. (Turner *vs.* Hardey, 9 M. & W., 770; 11 Id., 773; Pearce *vs.* Smith, 2 Brev., 360; 2 Wms., Ex'rs, [950.]) One joint trustee or executor may receive the income or rent of property himself, or he may appoint a bailiff to collect it. (Newman *vs.* Keffer, 9 Casey, 442, *n.*; Connolly *vs.* Belt, 5 Cr. C. C., 405.)

It has been held that several *administrators* must *all* join in executing the acts of their office. (1 Wms., Ex'rs, [428;] 2 *Id.*, [950,] [951;] 4 Bacon's Elements, 83; In the Goods of Naylor, 2 Robert., 409; Comyns, Dig., tit. "Administrators;" Shep. Touchst., 484; 1 Atk., 460; Warwick *vs.* Greville, 1 Phillim., 126; Stanley *vs.* Bernes, 1 Hagg., 222.) In other cases administrators are placed on the same footing with executors. (2 Wms., Ex'rs, [950;] Willard *vs.* Fenn, Selw. N. P., 6th ed., 767 n. 8; Jacomb *vs.* Harwood, 2 Ves., sr., 267; Herald *vs.* Harper, 8 Blackf., 170; Dean *vs.* Duffield, 8 Texas, 235; Bryan *vs.* Thompson, 7 J. J. Marsh., 587; Beattie *vs.* Abercrombie, 18 Ala., 9; Rick *vs.* Gilson, 1 Pa. St., 58; Shep. Touchst., 485, 486; Smith *vs.* Everett, 27 Beav. 454.)

But if persons who are executors are, though acting under a will, really *trustees* executing a *trust*, and as such separate and distinct from their character as *administrative trustees*, all must, while living and in office, "perform their duties in their joint capacity." (1 Perry, Trusts, 2d ed., sec. 411; 2 *Id.*, sec. 499; Smith *vs.* Wildman, 37 Conn., 384; White *vs.* Watkins, 23 Mo., 423; *Ex parte* Griffin, 5 Gl. & J., 116; Shook *vs.* Shook, 19 Barb., 653; DePeyster *vs.* Ferrers, 11 Paige, 13; Franklin *vs.* Osgood, 14 Johns., 560; Cox *vs.* Walker, 26 Me., 504; Hill *vs.* Josseyln, 13 Sm. & M., 597; Crewe *vs.* Dicken, 4 Ves., 97; Fellows *vs.* Mitchell, 1 P. Wms., 83; s. c., 2 Vern., 516; Churchill *vs.* Lady Hobson, *Id.*, 241; Chambers *vs.* Minchin, 7 Ves., 198; Leigh *vs.* Barry, 3 Atk., 584; Belcher *vs.* Parsons, Amb., 219; *Ex parte* Rigby, 19 Ves., 463; Webb *vs.* Ledsam, 1 K. & J., 385; Latrobe *vs.* Tiernan, 2 Md. Ch., 480; Vandever's App., 8 W. & S., 405; Sinclair *vs.* Jackson, 8 Cow., 544; Ridgeley *vs.* Johnson, 11 Barb., 527; Austin *vs.* Shaw, 10 Allen, 552; King *vs.* Stone, 6 Johns. Ch., 323; Powell *vs.* Tuttle, 3 Comst., 396; Sherwood *vs.* Read, 7 Hill, 431; Hill on Trustees, Am. ed., 1846, p. 305; 2 Fonbl. Eq. B. 2, ch. 7, sec. 5; 1 Cruis. Dig., tit. 12, ch. 4, sec. 39.)

It follows from this requirement of joint action that if one of the trustees become insane, his place must be supplied by the proper court or in some other authorized manner, in order to the execution of the trust. (1 Perry, Trusts, 2d ed., sec. 411; Smith *vs.* Wildman, 37 Conn., 384; Dowley *vs.* Sherratt, 2 Eq. Ca. Ab., 742; *Re* Cong. Church *vs.* Smithwick, 1 W. N., 196; Scruggs *vs.* Driver, 31 Ala., 274; Matter of Wadsworth, 2 Barb. Ch., 381; Matter of Mechanics' Bank, *Id.*, 446; Burrill *vs.* Sheil, 2 Barb., 457; Wood *vs.* Wood, 5 Paige, 596; Davis *vs.* McNeil, 1 Ired. Eq., 344; Matter of Van Wyke, 1 Barb. Ch., 565; Guyton *vs.* Shane, 7 Dana, 498; Ridgeley *vs.* Johnson, 11 Barb., 527; *Ex parte* Belchier, Amb., 219.)

The assistant treasurer's statement does not present a simple case of disclaimer or of survivorship among executors.

The insane executor or testamentary trustee cannot be divested of the legal title to the assets or trust-property by any act of the co-executor. Where, as in this case, all the executors were, but are not now, *sui juris*, recourse must be had to the proper court of equity for the removal of the incompetent executor, the grant of fresh probate, or such other action as the law of the State may provide for. The mere existence of lunacy never operates to revoke a power. (*Wallis vs. Manhattan Co.*, 2 Hall's Sup. Ct., 500.)

It has been held that, if a co-executor become *non compos*, the proper court may, on account of the disability, remove him from office and either confer the executorial power upon the competent executors or testamentary trustees, or else appoint another in his stead. (*Hills vs. Mills*, 1 Salk., 36; *Evans vs. Tyler*, 2 Robert., 128, 134; In the Goods of *Hardstone*, 1 Hagg., 487; *Offley vs. Best*, 1 Sid., 373; *Stearns vs. Fisk*, 18 Pick., 24, 28; In the Goods of *Newton*, Curteis, 428; In the Goods of *Marshal*, *Id.*, 297; *Thayer vs. Homer*, 11 Met., 110; *Hussey vs. Coffin*, 1 Allen, 354; *Winship vs. Bass*, 12 Mass., 199; *Drake vs. Green*, 10 Allen, 124; *Switzer vs. Skiles*, 3 Gilm., 529; *Diefendorf vs. Spraker*, 6 Seld., 246; *Shepherd vs. McEvers*, 4 Johns. Ch., 136; *Matter of Jones*, 4 Sandf., 615; *Cruger vs. Halliday*, 11 Paige, 314; *Courtenay vs. Courtenay*, 3 Jo. & La., 529; *Wms., Ex'rs*, [238,] [517,] [518,] [519,] [579,] *Perry, Trusts*, secs. 401, 921; *Bac. Abr.*, 50 tit. *Ex'rs*, E; *Comyns' Dig. Admr.*, B. 8.)

The statutes of the several States generally lay down a rule of practice in the case of insane executors, administrators, guardians, and trustees. When one of two or more executors who have proven the will has become *non compos*, the English practice under Stats. 11 Geo. IV; 1 W. IV, c. 60; and 13 and 14 Vict., c. 60, seems to be to revoke the probate, and grant probate afresh to the other executor or executors, *therein reserving a power of making a light grant to the insane executor if he shall become of sound mind and apply for the same.* (Goods of *Marshal*, 1 Curteis, 297.) A like practice obtains in case of administration. (In the Goods of *Phillips*, 2 Add., 336.) In Massachusetts the probate court may remove an executor or administrator who has become insane, or otherwise incapable of discharging the trust. (*Genl. Stats.*, c. 101, s. 2; *Thayer vs. Homer*, 11 Met., 110; *Hussey vs. Coffin*, 1 Allen, 354; *Drake vs. Green*, 10 *Id.*, 124; *Winship vs. Bass*, 12 Mass., 199.)

In Pennsylvania the practice seems to be that when an executor, administrator, or guardian shall have been duly declared a lunatic or

an habitual drunkard, the orphans' court, having jurisdiction over the accounts of such executor, administrator, or guardian, may vacate the letters testamentary or of administration granted to such executor or administrator, remove such guardian, and award new letters, to be granted in such form as the case may require; and the court may make such order for the security of the trust property, and for its delivery to the successors of such executor, administrator, or guardian, as the circumstances of the case may require. (Act March 29, 1832, sec. 26.) By special provision for the county of Philadelphia, (act of March 3, 1847,) it seems that executors in that county or city may renounce trusts created by will, and to be executed by them, without in any way affecting or destroying their office and trust as executors generally.

The matter submitted does not make a case involving the authority of a survivor or survivors of trustees in executing a *power* or a *trust*. When there are several trustees authorized to execute a *power*, whether created by will or otherwise, with no specific provision as to survivorship, and one or more of them die, a different question arises. The rule in such case seems to be—with, however, some conflict among the authorities—that if a *naked* power be given to the “trustees,” even *nominatim*, yet in their *official character* as “the trustees,” the survivors or survivor of them may execute it, because it is annexed to the office, or to the trustees *ratione officii*. (1 Wms., Ex'rs, [655;] 2 *Id.*, [954,] [955;] 2 Perry, Trusts, 2d ed., secs. 499, 502, 505; Hill, Trustees, Am. ed., 303, 304; 1 Sugd., Powers, 6th ed., 142; 1 Coke upon Littleton, Butler & Hargrave's Notes, 113 a, note 2; Peter *vs.* Beverly, 10 Pet., 532.)

Where, however, a mere *discretionary* power, or one simply collateral, has been given to several persons *expressly by name, and to them only*, all the individuals named must join in exercising it; and, in case of disclaimer by one or more of such persons, any act of those only who have accepted the trust will not be a valid execution of the power. (Hill, Trust., 307; 1 Sugd., Powers, 138; Worthington *vs.* Evans, 1 S. & St., 165; Clarke *vs.* Parker, 19 Ves., 19.) Nor will the *bonâ fide* refusal of a trustee to exercise a pure discretionary power for the benefit of the trust estate—for example, a power of varying securities—be a sufficient reason for a suit to have him discharged from the trust. (Lee *vs.* Young, 2 N. C. C., 532; Hill, Trust., 192.)

In cases where the power is thus strictly personal and not annexed to the office, nor containing words of survivorship, if one of two or more trustees die or refuse to act, the others cannot execute the power. (1 Perry, Trusts, sec. 414; 2 *Id.*, sec. 499; 1 Sugd., Powers, 141; Boston

F. Co. *vs.* Condit, 4 Green, Ch., 395; Co. Lit., 113 *a*, *n.* 2; Eyre *vs.* Shaftsbury, 2 P. Wms., 121; Att'y-Gen'l *vs.* Gleg, 1 Atk., 356; Amb., 584; Mansell *vs.* Vaughn, Wilm., 49; Butler *vs.* Bray, Dyer, 189 *b*; Peyton Bury, 2 P. Wms., 628.) The power will not survive in such cases; but it will survive when given to several trustees *as a class*; in which case even *one* survivor may execute it. (Brassey *vs.* Chalmers, 16 Beav., 231; s. c., 4 De G. M. & G., 528; 2 Wms., Ex'rs., [955;] 2 Perry, Trusts, secs. 499, 502; Co. Lit., 113; In matter of Bull, 45 Barb., 334; 1 Sugd. Pow., 6th ed., 142.)

A trustee who has disclaimed or renounced the power, or one duly discharged from a trust under an instrument or by decree of court, need not join in the acts of the other trustees; and it is immaterial that those acts are directed to be performed by the several individuals *nominatim*; for a gift to several individuals *nominatim* upon trusts is a gift to those only who accept the trust; and they, consequently, take full power to perform all *ministerial* acts incident to the office. (Hill, Trustees, 307; Flanders *vs.* Clark, 1 Ves., 9; Smith *vs.* Wheeler, 1 Ventr., 128; Hawkins *vs.* Kemp, 3 East, 410; Adams *vs.* Taunton, 5 Mad., 435; Worthington *vs.* Evans, 1 S. & St., 165; Taylor *vs.* Galloway, 1 Ohio, 282; Wood *vs.* Sparks, 1 Dev. & Bat. L., 389; Taylor *vs.* Adams, 2 Serg. & R., 534; Robertson *vs.* Gaines, 2 Humph., 367; Conover *vs.* Hoffman, 1 Bosw., 214.)

A trustee, however, who has once acted in or accepted the trust, and has not been properly discharged from it, must join with the other trustees; and it is immaterial that he has parted with the possession of the legal estate. (Crewe *vs.* Dicken, 4 Ves., 97; Small *vs.* Marwood, 2 B. & Cr., 307; 2 Sug. V. & P., 9th ed., 50; Hill, Trustees, 307.)

If a power or trust be coupled with an interest, the authority to execute it is generally held to survive. (1 Perry, Tr., sec. 414; 2 *Id.*, secs. 499, 505; Lane *vs.* Debenham, 11 Hare, 188; Peyton *vs.* Bury, 2 P. Wms., 628; Mansell *vs.* Vaughn, Wilm., 49; Eyre *vs.* Shaftsbury, 2 P. Wms., 108; Butler *vs.* Bray, Dyer, 189 *b*; Byam *vs.* Byam, 19 Beav., 58; Attorney-General *vs.* Gleg, 1 Atk., 356; Co. Lit., 112 *b*, 113 *a*, 181 *b*; Flanders *vs.* Clarke, 1 Ves., 9; Potter *vs.* Chapman, Amb., 100; Jones *vs.* Price, 11 Sim., 557; 2 Op. Att.-Gen., 397; Peter *vs.* Beverly, 10 Pet., 532; 1 How., 134; Shelton *vs.* Homer, 5 Met., 466; Treadwell *vs.* Cordis, 5 Gray, 388; Gibbs *vs.* Marsh, 2 Met., 252; Wells *vs.* Lewis, 4 Met. Ky., 269; Bonefant *vs.* Greenfield, Cro. Eliz., 80; Franklin *vs.* Osgood, 2 Johns. Ch. 19; Davoue *vs.* Fanning, *Id.*, 254; Lessee of Zebach *vs.* Smith, 3 Binn., 69; Muldrow *vs.* Fox, 2 Dana, 79; Hunt *vs.* Rousmaniere's Administrators, 2 Mason, 244; s. c., 8 Wheat.,

174; Wood *vs.* Sparks, 1 Dev. & Bat., 389; Burr *vs.* Sim, 1 Whart., 266; Niles *vs.* Stevens, 4 Denio, 399; Coykendall *vs.* Rutherford, 1 Green, Ch., 360; Putnam Free School *vs.* Fisher, 30 Me., 526; Jackson *vs.* Burtis, 14 Johns., 391; Robertson *vs.* Gaines, 2 Humph., 367; Miller *vs.* Meetch, 8 Barr, 417; Sharp *vs.* Pratt, 15 Wend., 610; Wardwell *vs.* McDowell, 31 Ill., 364; Jackson *vs.* Given, 16 Johns., 167; Jackson *vs.* Ferris, 15 Johns., 391; Watson *vs.* Pearson, 2 Exch., 594 n.; Cadogan *vs.* Ewart, 7 Ad. & El., 636; Taylor *vs.* Morris, 1 Comst., 341; Tainter *vs.* Clark, 13 Met., 220; Warden *vs.* Richards, 11 Gray, 277.)

The power of an executor is not determined by the death of his co-executor, but survives. (2 Wms., Ex'rs, [951;] 1 Perry Trusts, sec. 414; Flanders *vs.* Clark, 3 Atk., 509; s. c., 1 Ves., sr., 9; Adams *vs.* Buckland, 2 Vern., 514; Hudson *vs.* Hudson, 1 Atk., 460; s. c., Cas. temp. Talb., 127.)

Where the power to executors to sell arises by implication, the power to the survivor to sell will arise in the same way. (1 Wms., Ex'rs, [655;] 2 *Id.*, [955;] Forbes *vs.* Peacock, 11 M. & W., 630; Houck *vs.* Houck, 5 Pa. St., 273; Franklin *vs.* Osgood, 14 Johns., 527; Magruder *vs.* Peter, 11 Gill & J., 217; 4 Kent, Com., 325, 327; Brassey *vs.* Chalmers, 16 Beav., 231; s. c., 4 DeG., M. & G., 528.) In the case, however, of the committee of a lunatic, the death of one extinguishes the office. (1 Perry, Trusts, sec. 414; *Ex parte* Lyne, Cas. temp. Talb., 143.)

Testamentary guardianship survives. (1 Perry, 414; Eyre *vs.* Shaftsbury, 2 P. Wms., 103.*) But it is otherwise with guardians appointed by a court. (1 Perry, 414; Bradshaw *vs.* Bradshaw, 1 Russ., 528; Hall *vs.* Jones, 2 Sim., 41.)

*In the case of Mr. Justice Eyre *vs.* The Countess of Shaftsbury it appeared that the Earl of Shaftsbury had by will devised the guardianship of the person and estate of his infant son to Mr. Justice Eyre, and two other persons, until the son should come to twenty-one years of age. The two latter guardians died before the son came to the age of twelve years, and the will devised the guardianship *without saying* "and to the survivors of them." It was argued for the Countess, who desired to secure the guardianship, that (1) upon the wording of the will the Lord Chief Baron (Eyre) had then no right to the guardianship, the same having been devised to him and two others, without saying "and to the survivor of them;" and that (2) the guardianship was a joint personal confidence wherewith three were intrusted; wherefore, by the death of any one of them, the guardianship determined.

To prove that a guardianship is personal, it was urged that it is not assignable, and that it will not go to executors or administrators.

The court held that the guardianship survived: "This is not a naked authority: it is coupled with an interest, in that (1) a guardian may bring an action and avow in his own name; (2) may make leases (2 Roll. Abr., 41, pl. 3) during the minority of the infant; (3) and may grant copy-holds (*Ibid.*) even in reversion, as *dominus pro tempore*. Such testamentary guardian takes the place of all other guardians, and his interest is for the good and honor of the family."

The principle upon which this case was decided is that the statute of 12 Car. 2 (which was drawn by Lord Chief Justice Hale) gives the guardian an authority coupled with an interest (tenure and guardianship in chivalry having been taken away) and puts him *in loco patris*. Still, the *intention* of the deviser was not ignored. The infant earl was not above a year old when the testator had appointed the three

At common law, a *naked* power by will to executors to sell in a case where one *renounces* the trust, cannot be executed by the remaining executors. (2 Wms., Ex'rs, [951;] Co. Lit., 113 *a*; Painter *vs.* Clark, 13 Met., 226; Boston Franklinite Co. *vs.* Condit, 4 Green, Ch., 395; Shelton *vs.* Homer, 5 Met., 466, 467; Chandler *vs.* Rider, 102 Mass., 270; Floyd *vs.* Johnson, 5 Litt., Ky., 109; see Gould *vs.* Mather, 104 Mass., 290; Bodley *vs.* McKinney, 9 Sm. & M., 339; Hudson *vs.* Hudson, Cas. temp. Talb., 127; 2 Perry, Trusts, sec. 499; Crewe *vs.* Dicken, 4 Ves., 97; Granville *vs.* McNeile, 7 Hare, 156; Hawkins *vs.* Kemp, 3 East, 410; Cooke *vs.* Crawford, 13 Sim., 96; Adams *vs.* Taunton, 5 Mad., 435; Bayly *vs.* Cumming, 10 Ired. Eq., 410; Sands *vs.* Nugee, 8 Sim., 130.)

A *power* may be given by one party to another, either with or without a trust. There is a distinction between the execution of *powers* and of *trusts*. Powers are of various kinds: as (1) a *naked* power; (2) a power coupled with an interest; (3) a power executed upon a consideration; (4) a power given as security for a debt. (McAllister's case, *ante*, 167.)

So a *trust* may be created in which trustees shall preserve and execute a *trust proper*; or, along with it, *execute powers* which may be (1) *naked*, (2) coupled with an interest, (3) executed upon a consideration, (4) given as security for a debt, or (5) for the purpose of giving or revoking consent. (Reresby *vs.* Newland, 2 P. Wms., 101.)

As to trusts, there is generally a *survivorship* for the purpose of holding title or maintaining actions. (Perry, Trusts, secs. 343, 344, 414, 426; Hill, Trustees, 303, 304.)

When co-trustees have the legal title to trust property, and so an authority coupled with an interest, the office of trustee is "impressed with the quality of survivorship." (1 Perry, Trusts, sec. 414; Gray *vs.* Lynch, 8 Gill, 403; Ratcliffe *vs.* Langston, 18 Md., 383; Webster *vs.* Vandeventer, 6 Gray, 428; Trask *vs.* Donoghue, 1 Aik., 370; Matter of Crossman, 20 How. Pr., 350; Williams *vs.* Otey, 8 Hump., 563; Stewart *vs.* Pettus, 10 Mo., 755; Mixon *vs.* Rose, 12 Gratt., 425; Jones *vs.*

guardians; and the Lord Commissioners considered that "it was hardly probable that the testator himself should imagine that all these three guardians should live until the child's age of twenty-one; and then, to say that the guardianship shall determine by the death of any one of the guardians, would be to affirm that the more care the father takes of the child's education, the less it shall profit the child, because by the death of any one of these guardians the child shall be without a guardian, and the more of them were appointed by the father, the less likelihood there would be that they all should live till the child should arrive at twenty-one." (2 Perry, Trusts, 2d ed., sec. 721; Loring *vs.* Marsh, 2 Cliff., 469; Fountain *vs.* Ravenel, 17 How., 382; Moore *vs.* Moore, 4 Dana, 366; Down *vs.* Worrall, 1 My. & K., 561; Green *vs.* Allen, 5 Hump., 170; Griffin *vs.* Graham, 1 Hawks, 96; Williams *vs.* Pearson, 38 Ala., 299.)

Maffet, 5 Serg. & R., 523; Peter *vs.* Beverly, 10 Pet., 564; 2 Op. Att.-Gen., 397; Hudson *vs.* Hudson, *t.* Talb., 129; Co. Lit., 113*a*; Att.-Gen. *vs.* Gleg, Amb., 585; s. c., 1 Atk., 356; Billingsley *vs.* Mathew, Toth., 168; Gwilliams *vs.* Rowell, Hard., 204; Butler *vs.* Bray, Dyer, 189, *b*; Dominick *vs.* Sayre, 3 Sand., 555; Belmont *vs.* O'Brien, 2 Kern., 394; DePeyster *vs.* Ferrers, 11 Paige, 13; Moses *vs.* Murgatroyd, 1 Johns. Ch., 119; Shook *vs.* Shook, 19 Barb., 653; Gregg *vs.* Currier, 36 N. H., 200; Powell *vs.* Knox, 16 Ala., 364; Parsons *vs.* Boyd, 20 Ala., 112; Leggett *vs.* Hunter, 19 N. Y., 445; Aubuchon *vs.* Lory, 23 Mo., 99; Barton *vs.* Tunnell, 5 Harr., 182; Smith *vs.* McConnell, 17 Ill., 135; Hopper *vs.* Adee, 3 Duer, 235; Britton *vs.* Lewis, 8 Rich. Eq., 271.)

This principle of survivorship where an interest attaches is illustrated by trusts created for the benefit of creditors; as, *e. g.*, where there are several assignees, and one dies, the execution of the trust devolves (in the absence of any special provision to the contrary) upon the survivors. (Burrill, Assignments, sec. 465; Hill, Trustees, 303, and note; Hannah *vs.* Carrington, 18 Ark., 85; Hart *vs.* Bulkley, 2 Edw. Ch., 70; Peck *vs.* Ingraham, 28 Miss., 246; Bowman *vs.* Raineteaux, Hoff. Ch., 150; 1 Caines' Cas., 16.)

The foregoing discussion of the principles involved in the settlement of the question raised by the inquiry from Philadelphia may aid the parties in interest to act understandingly in the matter. There is not sufficient evidence to enable the Comptroller to give a full and categorical answer to the question propounded by the assistant treasurer; but if the two executors are by the will authorized to make the proposed contract for the continuance of the bond at a reduced rate of interest, and there are no words in the instrument empowering one of them to act without the concurrence of the other, there can be no power to enter into the contract until the place of the executor who has become insane shall have been supplied, or a decree of court authorizing the remaining executor to execute the trust in the manner proposed shall have been obtained.

TREASURY DEPARTMENT,

First Comptroller's Office, April 27, 1881.

IN THE MATTER OF THE AVAILABILITY OF AN APPROPRIATION FOR A PRIVATE CHARITABLE INSTITUTION WHICH IS, TOGETHER WITH THE OTHER MONEY IN POSSESSION, INSUFFICIENT TO MAKE FULL PAYMENT OF THE PRICE OF THE PROPERTY.—GERMAN-ASYLUM CASE.

1. When an act appropriates money "for the purpose of *paying for the* [real estate] *property recently purchased*" for an asylum, and it appears that by the terms of the contract of purchase, and simultaneously with the delivery of the deed of conveyance to the Asylum Association, a trust-deed in the nature of a mortgage is to be made by the Association to the vendor on the larger portion of the real estate, to secure payment of \$8,000 of the purchase-money which would remain due after the expenditure of the appropriation, such appropriation cannot lawfully be placed to the credit of the fiscal officer of the Association.
2. In such case an appropriation for the purpose of paying for property is available to be used only when with it alone, or supplemented by other money, full payment is made.
3. When an appropriation is made "for the purpose of *paying for*" designated property, it can be used only in making full payment.

The act approved June 4, 1880, making appropriations for the fiscal year ending June 30, 1881, and for other purposes, appropriated "for the erection of a building for the German Orphan Asylum, ten thousand dollars." The first clause of the act provided that one-half of this sum should be paid "out of the revenues of the District of Columbia." Section 2 provided that the appropriation should not be "exceeded either in requisition or expenditure."

The appropriation has not been used, for these reasons: (1) There was in the District of Columbia no corporation or institution by the name given in the act; and (2) the corporation which appears to have been intended—namely, the German Protestant Orphan Asylum Association—had no site on which to erect the building contemplated in the appropriation act.

The act approved March 3, 1881, making appropriations for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1882, amended the act of June 4, 1880, to read: "For the German Protestant Orphan Asylum Association of the District of Columbia, for the purpose of paying for the property recently purchased by them for an asylum."

On September 25, 1880, a contract was made between the German Protestant Orphan Asylum Association and S. G. Cabell, in pursuance of which Cabell then made a deed of conveyance—delivered in escrow, and to be delivered absolutely upon the securing of the pur-

chase-money—to the Association of thirty-two acres of land, known as Good Hope Place, in the District; the purchase price of which was \$20,000, payable as follows: \$2,000 then paid; \$10,000 to be paid with the appropriation of money made by the appropriation act of June 4, 1880; and \$8,000 to be paid in eight successive annual payments of \$1,000 each, with interest at 4 per cent. per annum, to be secured by a deed of trust executed by the Association to Cabell on twenty-five acres of the land, leaving seven acres, with buildings thereon, unincumbered.

The money appropriated “for the purpose of paying for” this property by the act of 1880, as amended, remains in the Treasury. The proper officer of the Asylum Association has applied to the Secretary of the Treasury for the amount of the appropriation, in order to make payment therewith of a part of the purchase-money, according to the terms of the contract referred to. The application has been referred to this office; and the question arises thereon, whether the money can be placed to the credit of the fiscal officer of the Association for the purpose stated.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The appropriation for the erection of a building for the German Orphan Asylum made in the act of June 4, 1880, was based upon the assumption that the association or institution contemplated by the act was the owner of property upon which the building should be erected. This assumption was without foundation in fact. The amendment contained in the act of March 3, 1881, was also based upon an erroneous assumption, namely, that the amount appropriated would *pay* for the property recently purchased for an asylum by the German Protestant Orphan Asylum Association; whereas it formed but one-half the purchase-money, and, when joined to the first payment on the contract of purchase, still fell short \$8,000.

The appropriation, as amended, is made “for the purpose of *paying* for the property recently purchased,” &c. It is not for the purpose of making *part* payment of the purchase-money of the property.

Bouvier, in his Law Dictionary, defines “payment” as “the *fulfilment* of a promise, or the performance of an agreement. The discharge in money of a sum due.” He says: “Payment, in its most general acceptation, is the *accomplishment* of every obligation, whether it consists in giving or in doing. *Solutio est præstatio ejus quod in obligatione est.* * * * *Solvere dicitur cum qui fecit quod facere promisit.* * * * *Numeratio est nummarie solutio.*” (5 Massé, Droit Commercial, 229.)

Sound policy requires the word "payment" to be construed as meaning a full discharge of the liability in question. If a mortgage or trust-deed incumbrance is on the land, or on a part of it, such land may be sold to pay the debt thereby secured; and thus the benevolent purpose of Congress and the members of the Association could be defeated.

The Association is without revenues, and is not designed to be a dividend-paying institution. If the appropriation be used now, the danger of a sale of the land for debt may operate in some sense to constrain Congress to make future appropriations. Such appropriations might be eminently proper; but it is scarcely to be presumed that Congress intended to prepare the way for conditions likely or liable to create a necessity for future appropriations beyond even the current support of the institution. If the Association cannot, with the aid of the appropriation already made, pay for the land, it is quite probable that it will not be able, without further subsidies from Congress, to carry out the humane and laudable purposes which animate it in the effort to found an orphan asylum.

When acts of Congress have authorized the purchase of real estate for the United States, the usage has always been that the accounting officers, before authorizing payment therefor, require evidence of a valid title, clear of any incumbrance. (See Rev. Stats., 355.) This usage is simply the rule of good business men in ordinary transactions of like character; and there is no cogent reason for a departure from it in the present case.

It is not shown that Congress, when it voted for the appropriation, knew of the provisions of the contract of purchase, or the prospective liability which those provisions *might* entail.

The principle involved in this case may be more important than would appear on a casual view. Congress frequently appropriates fixed sums to make payment for real estate which the law authorizes to be purchased. In such case it is very important to know whether the authority to purchase is so limited that the appropriation is to be used in *full* payment, or may be applied in *part* payment involving future liability. Congress has carefully determined its policy by express legislation, in a provision making no new law, but *declaratory* of the effect of such appropriations. A provision in section 3732 of the Revised Statutes, making an exception, treats sections 3679, 3733, and 5503 as declaratory.

The erection of an asylum for the purpose indicated is an enterprise doubtless worthy of liberal consideration, and all laws intended to promote that purpose are to be liberally construed. In kindred cases, where

the facts are reasonably in doubt, the impulses of humanity should be allowed to assert their sway and give effect to claims so deserving. But in this case no material fact is in doubt or dispute; and the clear, cold logic of the law, which in cases of doubt might yield precedence to the impulses of the heart, asserts a dominion which cannot be denied.

The money appropriated by Congress cannot, therefore, be placed to the credit of the fiscal officer of the German Protestant Orphan Asylum Association for the purpose of making *part* payment of the price of the property whereon to erect the asylum building.

TREASURY DEPARTMENT,

First Comptroller's Office, April 28, 1881.

**IN THE MATTER OF THE POWER OF SURVIVING TRUSTEES,
PENDING A VACANCY IN THE TRUSTEESHIP, TO ASSIGN
CALLED BONDS.—TRUSTEE-SURVIVORSHIP CASE.**

1. When two executors under a will are by it directed to appoint a third person to act with them as trustees of a fund to be invested, the interest to be annually paid to beneficiaries named, the three trustees are charged with duties distinct from those appertaining to or devolving upon the two executors.
2. If the third person so appointed trustee dies, his place must be supplied by the proper court, so that three trustees shall execute the trust, it being the apparent intention of the testator to require the skill and judgment of three trustees.
3. When in such case the will makes no provision for survivorship, or for supplying the place of a trustee who dies, the power of appointment is exhausted by the first appointment. A new trustee should be appointed by the proper court.

In the last will and testament of Robert L. C. Atcheison Alexander, deceased, late of Woodford County, Kentucky, a fund is provided as to which the will declares:

“Which sum as received, together with any other money belonging to my estate which shall come into their [the executors'] hands not disposed of by this will, shall be invested in some secure and interest-yielding investment, in the names of A. J. Alexander, J. B. Waller, and some one other person selected by A. J. Alexander and J. B. Waller, as trustees for the benefit of my two sisters, to whom the interest shall be paid annually or semi-annually, one-half to each sister during her life.”

A. J. Alexander and J. B. Waller, who are the executors under the will, appointed W. R. Thompson a co-trustee with them under this clause. These three trustees invested a part of the fund in United States bonds, popularly known as “Sixes of 1881,” issued under the

act of Congress of March 3, 1863, (12 Stats., 709,) which bonds were registered in their names as trustees. These bonds are now called in for payment. Thompson, one of the trustees, having died, the question is presented, whether the two remaining trustees, who have acted as such since the death of Thompson, can now assign the bonds to the Secretary of the Treasury, for redemption, and receive payment thereof.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The bonds in question are not held by executors in their capacity as such, but by trustees in a distinct and separate capacity. The will creating the trust gives two persons, who are executors thereunder, power to appoint a third person to act with them as trustees. The will does not authorize the survivors to execute the trust, but it shows a purpose to require the exercise of the judgment and skill of *three* trustees. It makes no provision for supplying the place of any trustee who may die. The power of appointment to the two trustees was exhausted by the appointment of Thompson. It is not intended to say that there may not be survivorship, at least for some purposes, in the case of several trustees who have the dry *legal title* to a trust fund. (1 Perry, Trusts, 2d ed., secs. 199, 343, 344, 414; Midland Counties Railway Co. *vs.* Westcomb, 11 Sim., 58; Att'y-Gen. Berrien, 2 Op., 397.) But when it is apparent, as in this case, that the creator of the trust intended that the *cestuis que trust* should have the benefit of the skill and judgment of *three* trustees, the purpose so manifested must be carried out. (Hill, Trustees, 472, 489; Cole *vs.* Wade, 16 Ves., 45; Townsend *vs.* Wilson, 1 B. & Ald., 608; 1 Sudg. Pow., 6th ed., 141, 144; Co. Litt., 113 *a*, note 2, by Hargrave.)

In the leading case of Townsend against Wilson, where a power of sale reserved to three trustees and their heirs was, upon the death of one of them, executed by the other two, the Court of King's Bench (*Ellenborough*, C. J.) unanimously held such execution of the power to be invalid. (1 B. & Ald., 616; s. c., *nom.* Townshend *vs.* Wilson, 3 Madd., 261; Dyer, 177 *a*, pl. 32; Peyton *vs.* Bury, 2 P. Wms., 626; Mortimer *vs.* Ireland, 6 Hare, 196; Cooke *vs.* Crawford, 13 Sim., 91; Ockleston *vs.* Heap, 1 De Gex & S., 640; Macdonald *vs.* Walker, 14 Beav., 556; Wilson *vs.* Bennett, 20 Law J. Rep., N. S., Chanc., 279, vol. 5 E. L. & Eq., 45; s. c., 5 De Gex & S., 475; *In re* Burt, 1 Drew., 319.)

The two surviving trustees cannot execute the trust. (2 Perry, Trusts, secs. 496, 497; Peter *vs.* Beverly, 10 Pet., 533; Crewe *vs.* Dicken, 4 Ves., 97; Cole *vs.* Wade, 16 Ves., 27, 44; Bond-Continuance case, *ante*, 218.)

The vacancy in the trusteeship must be filled by the proper court before the bonds can be assigned for redemption to the Secretary of the Treasury.

TREASURY DEPARTMENT,

First Comptroller's Office, April 29, 1881.

IN THE MATTER OF EMPLOYMENT AND COMPENSATION OF PERSONS TO EXAMINE OR INSPECT SURVEYS OF THE PUBLIC LANDS.—SURVEY CASE.

1. Under the act of March 3, 1881, appropriating money "for surveying the public lands," and "for occasional examinations of public surveys in the several surveying districts," and to "inspect mineral deposits," no person can be employed or appointed to examine or inspect for a *definite prescribed period*, without reference to the requirements of the service.
2. Under that act the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, may employ persons or appoint special agents to "inspect mineral deposits, coal-fields, and timber districts," whose compensation and expenses are to be paid out of the appropriation of \$8,000 made by the act.
3. The Commissioner may in like manner appoint special agents to examine or inspect the work of "surveying the public lands," whose compensation and expenses are to be paid out of the appropriation of \$300,000 for "surveying the public lands."
4. The confidential agents who may be appointed by surveyors-general, under section 2223 of the Revised Statutes, and subject to its limitations, are to be paid for services and expenses out of said appropriation of \$8,000.
5. When an appropriation in gross is made for a specific service, as for "surveying the public lands," the executive officer charged with the duty of carrying the law into effect may, in the absence of any restraining provision, appoint such special agents as may be necessary in order to secure a proper performance of the work.
6. If for *any portion* of the service there be a specific appropriation, no expenditure for such portion beyond the amount thus specifically appropriated can be made; nor can any excess of such expenditure be defrayed out of any other appropriation.
7. The Commissioner of the General Land Office is an *auditor* as to "all public accounts relative to the public lands," and such accounts, audited by him, are subject to revision by the First Comptroller.

The following questions are submitted for decision:

I.—Can the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, employ a man *permanently*, as inspector or examiner, to make examinations of surveys in the several surveying districts?

II.—If so, can the person so employed be paid a salary of \$3,000 *per annum*? or must the compensation be a *per diem* allowance?

III.—If such appointment be made, should the compensation be paid from the appropriation for “surveying”? or from that for “occasional examinations”?

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is required to perform all executive duties appertaining to the survey of the public lands. (Rev. Stats., 453; see, also, secs. 161, 441.) In like manner he is authorized to make, enforce, and carry into execution proper regulations as to public surveys. (Rev. Stats., 2478.) Surveyors-general are respectively required, *occasionally* in person, to inspect surveying operations, in order to secure the faithful execution of contracts for making surveys, and may depute *confidential agents* to make examinations for a prescribed *limited period*, who shall be allowed a fixed *per diem* compensation and expenses. (Rev. Stats., 2223.)

The “sundry civil” appropriation act of March 3, 1881, for the service of the fiscal year ending June 30, 1882, appropriates—

“For surveying the public lands, three hundred thousand dollars, to be immediately available, at rates not exceeding twelve dollars per linear mile for standard and meander lines, ten dollars for township, and eight dollars for section lines. * * *

“For occasional examinations of public surveys in the several *surveying districts*, in order to test the accuracy of the work in the field, inspect mineral deposits, coal-fields, and timber districts, eight thousand dollars.”

There are sixteen surveying districts, each with a surveyor-general therein. (Rev. Stats., 2207.) The district of Kansas is abolished, and Nebraska and Iowa form but one district.

In view of the provisions of the statutes above cited, it must be held that—

I.—No person can be employed or appointed *permanently* by the Commissioner of the General Land Office to inspect the surveying operations of the surveys of the public lands or to make examinations of public surveys, in order to test the accuracy of the work in the field. By “*permanently*” is, of course, understood for the fiscal year 1882, or some definite portion thereof prescribed by the Commissioner, without reference to the question of the requirements of the service. The statutes do not contemplate *such* appointment. Appointments are to be made for a *service*, not for a *time* of service. An appointment may be

limited in time, but cannot be made to cover a period beyond the necessities of the service.

The appointments of confidential agents, under section 2223 of the Revised Statutes, are made by the respective surveyors-general only in the several proper districts. But special agents, not necessarily limited to any particular district, can, with the approval of the Secretary of the Interior, be appointed by the Commissioner of the General Land Office to "inspect mineral deposits, coal-fields, and timber districts," and also to examine or inspect the work of "surveying the public lands."

The fact that surveyors-general, respectively, have authority to depute confidential agents for a period not to be "protracted beyond thirty days," does not take from or limit the authority of the Commissioner to cause examinations of surveys for testing the accuracy of the work, and otherwise executing the law, to be made.

This is a part of his general authority in the execution of the laws. (Bender's case, 1 Lawrence, Compt. Dec., 317; Eveleth's case, *ante*, 20.)

The appropriation of \$8,000, to which reference is above made, is designed for two purposes: (1) to meet expenditures for confidential agents of surveyors-general, under section 2223 of the Revised Statutes; and (2) to inspect mineral deposits, coal-fields, and timber districts. The language of the appropriation act—"in the several surveying districts"—copied substantially from section 2223 of the Revised Statutes, shows that the purpose was in part to meet the demands of that section, which requires a service in districts. The two purposes named give effect to the clause appropriating \$8,000; and, in view of this, it is not to be presumed that it was designed to limit the general authority as to surveys, though this authority was limited as to the inspection "of mineral deposits, coal-fields, and timber districts."

So much of the \$8,000 so appropriated as may be applied for expenses of confidential agents appointed by surveyors-general is subject to the limitations of section 2223 of the Revised Statutes.

As to that portion to be expended for inspecting "mineral deposits, coal-fields, and timber districts," the limitations of section 2223 do not apply; and special agents for such purpose are to be appointed by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior. The Commissioner of the General Land Office has also authority to appoint in like manner special agents to inspect the operations of surveys in the field, to ascertain the progress, character, and accuracy of the work, and to report thereon. This inspection may be very essential and important. It is scarcely to be

presumed that Congress intended that contracts should be made for surveying, and yet that no steps should be taken by the highest executive officers having supervision of the work to insure the faithful performance of such contracts. Supervision is an essential part of "surveying the public lands."

If there were a specific appropriation of a fixed sum to be used by the *Commissioner of the General Land Office* for making examinations of surveys, it would be deemed the only money available for that purpose. (Birch's case, 1 Lawrence, Compt. Dec., 154; Clerk's case, *Id.*, 305; 1 Op. Att.-Gen., 385; 4 *Id.*, 328; 6 *Id.*, 299.)

It is a general rule that, when Congress has made provision for a particular service, this will be deemed the only authorized provision; but when section 2223 of the Revised Statutes provides for confidential agents to make examinations for a limited period under the direction of surveyors-general, this is only to be deemed a limitation of the authority of the latter. It does not abridge the authority of the Commissioner of the General Land Office, *because his authority is supervisory*, and must be deemed adequate to accomplish its purpose—to supervise subordinate supervisors. The law has thus answered the question, *Quis custodiet ipsos custodes?*

The supervision by surveyors-general is a *distinct service*; hence the appropriation of \$8,000, a portion of which is for one service, cannot affect the other.

II.—Persons employed or agents appointed to perform the service stated, as to inspecting mineral deposits, coal-fields, and timber districts, and also as to making examinations of surveys, may be paid a reasonable compensation and reasonable and necessary *actual* expenses for the time necessarily employed. The accounts for compensation and expenses are to be audited and settled by the Commissioner of the General Land Office; but the *amount* and *legality* of all are subject to the revision and determination of the First Comptroller. (Rev. Stats., 456; see secs. 191, 269.)

III.—Special agents appointed by the Commissioner of the General Land Office and the Secretary of the Interior to inspect or examine surveys in the field are to be paid for services and expenses from the appropriations "for surveying the public lands." An agent so appointed is not a "commission or inquiry" within section 3681 of the Revised Statutes. (4 Op. Att.-Gen., 248; Swamp-Land case, *ante*, 136.) The same agents, or others, may be appointed to inspect mineral deposits, coal-fields, and timber districts. The expenses of this service are

to be paid from the appropriation of \$8,000. Separate accounts and vouchers of services and expenses in inspecting mineral deposits, &c., should be kept as distinct from those of inspecting, surveying, and examining surveys.

The same person may be appointed to make examinations in several surveying districts; and it is not doubted but that in all of them, by successive service in each, the entire time of one or more agents could be employed.

Appointments of special agents should be made in writing, signed by the Secretary of the Interior and the Commissioner of the General Land Office, and should specifically name the appropriation act under which they are made.

The expenditure of appropriations will be governed by the principles stated.*

TREASURY DEPARTMENT,

First Comptroller's Office, April 30, 1881.

*The following information on the general subject of this decision is given:

The act of June 23, 1874, (18 Stats., 213,) appropriated \$10,000 for examinations of the public surveys for the fiscal year 1875. A similar appropriation was made by the act of March 3, 1875, (18 Stats., 384,) for examinations of the public surveys for the fiscal year 1876.

Special agents appointed by either the Secretary of the Interior or the surveyors-general were paid from the foregoing appropriations; but no part of the appropriation of \$300,000 for surveying the public lands in 1875 and 1876, respectively, was used for examinations of surveys.

Congress made no appropriation for examinations of the public surveys during the years 1877, 1878, and 1879. During these years all special agents for examining public surveys, whether appointed by the Secretary of the Interior or by the surveyors-general, were paid from the annual appropriation of \$300,000 for those years respectively.

The act of March 3, 1879, (20 Stats., 392,) making appropriations for the fiscal year ending June 30, 1880, appropriates—

“For surveying the public lands, three hundred thousand dollars, to be available immediately * * *. Occasional examinations of public surveys in the several surveying districts, in order to test the accuracy of the work in the field, inspect mineral deposits, coal-fields, timber districts, and so forth, eight thousand dollars.”

For the fiscal year 1881 an appropriation of \$8,000 was made for examinations of the public surveys, (21 Stats., 273.) Agents appointed by either the Secretary of the Interior or the surveyors-general have been paid for the fiscal years 1880 and 1881 from the respective appropriations of \$8,000; but no part of the \$300,000 appropriated for surveying the public lands in 1880 and 1881, respectively, has been used for compensation or expense of agents in making examinations of the public surveys.

On the 27th May, 1880, the Commissioner of the General Land Office asked the decision of Hon. A. G. Porter, then First Comptroller, whether the expenses of special agents appointed to investigate alleged *depredations* upon the public timber could properly be paid from the appropriation of \$8,000 for examination of surveys, *inspection* of timber districts, &c., in the act of June 30, 1880, (20 Stats., 392.) The First Comptroller, in his decision of June 3, 1880, said:

“It seems quite clear that the above appropriation is intended *solely* for the purpose of paying the expenses of making the ‘occasional examinations’ of public surveys mentioned in section 2223 of the Revised Statutes.”

The expenditures for examinations have been as follows:

Appropriation.	Year.	For agents of surveyors-general.	For agents of Sec- retary of Interior.	Total.
\$10,000 00.....	1875	\$295 78		\$295 78
10,000 00.....	1876	3,406 14	\$2,947 20	6,353 34
	1877†			
300,000 00.....	1878	8,058 16	2,573 24	10,631 40
300,000 00.....	1879	11,740 66	4,455 09	16,195 75
8,000 00.....	1880	4,520 71	510 22	5,030 93
		28,021 45	10,485 75	38,507 20

† No appropriation and no assignment from \$300,000.

IN THE MATTER OF ASSIGNMENT OF AND INTEREST ON JUDGMENT AGAINST THE DISTRICT OF COLUMBIA.— CAMPBELL'S CASE.

1. A judgment against the District of Columbia is not negotiable; and though it is, on common-law principles, transferable for a valuable consideration, the act of June 16, 1880, (21 Stats., 285,) requires payment directly to the judgment-creditor.
2. A judgment in the Court of Claims against the District of Columbia, is not, under that act, payable until the time for appeal—namely, ninety days after the rendition of such judgment—has expired.
3. Such judgment does not bear interest by force of the general interest-statute of April 22, 1870, (16 Stats., 91,) but the original claim on which it is founded does, under the act of June 16, 1880, bear interest, at 3.65 per cent. per annum, during the ninety days allowed for appeal.
4. Such judgments are payable at the option of the Treasurer of the United States as *ex-officio* Commissioner of the Sinking-Fund, either in *money* or in District of Columbia *bonds* bearing interest at the rate of 3.65 per cent. per annum, payable semi-annually. But the amount to be paid is the amount of the *original claim at the time it was due and payable*, with interest at 3.65 per cent. per annum since August 1, 1874, to the expiration of ninety days from the date of the rendition of such judgments respectively.
5. The mode stated by which payment of judgments is to be secured.

April 25, 1881, Peter Campbell presented to the First Comptroller a copy of a judgment, as follows:

IN THE COURT OF CLAIMS.

December Term, 1880.

PETER CAMPBELL
vs.
THE DISTRICT OF COLUMBIA. } No. 311.

At a Court of Claims held in the city of Washington on the 7th day of April, 1881, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Peter Campbell do have and recover in the manner provided by the act of June 16, 1880, chapter 243, the sum of six hundred

and twenty-eight dollars and twelve cents, (\$628.12,) upon debts of the District of Columbia due and payable August the 1st, A. D. 1874, within the meaning of the sixth section of the said act.

A true transcript of record.

In testimony whereof, I hereunto set my hand and affix the seal of said court this 12th day of April, 1881.

[L. S.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Attest:

C. D. DRAKE, C. J.

SAM. M. WILCOX,
Attorney of Record.

The claimant, Campbell, asks "whether such judgment can be assigned so that the assignee may collect the same," and whether there is "any provision of law which prevents payment upon presentation" of a certified copy of the judgment? He says:

"In this case there is no appeal to be taken. * * * If paid in cash at once, the District will save ninety days' interest."

May 4, 1881, the Treasurer of the United States addressed to the Secretary of the Treasury a letter, saying:

"As the District of Columbia 3.65 bonds are now at a premium, it appears to be to the advantage of the District to pay the judgments of the Court of Claims * * * in money; and I have the honor to advise you that such is now the intention of the Treasurer, and that upon the receipt from you of said judgments, payment will be made in money in satisfaction thereof."

The letter was referred, May 5, by the Secretary to the First Comptroller.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

I.—The judgment referred to by the claimant, though not technically *negotiable*, is, on general principles of common law, when not otherwise provided by statute, *salable*, or transferable for a valuable consideration. (*Coates's Executrix vs. Muse's Administration et al.*, 1 Brock., 555; *Comegys vs. Vasse*, 1 Pet., 212.) The judgment is not a claim against the *United States*. It is not payable out of the Treasury of the United States within the meaning of section 3477 of the Revised Statutes. (Randolph's case, *ante*, 19.) It is to be paid by the Treasurer of the United States, not as such officer, but as successor to the Commissioners of the Sinking-Fund, and as now *ex-officio* Commissioner of the Sinking-Fund of the District of Columbia. (Acts June 11, 1878, 20 Stats., 107, sec. 7; June 16, 1880, 21 Stats., 286, sec. 6.) The assignment is not prohibited by section 3477 of the Revised Statutes. (Safford's case, 1 Lawrence, Compt. Dec., 287; Gill's case, 7 Ct. Cls., 522; s. c., 10 *Id.*, 156; Lawrence & Crowell's case, 8 *Id.*, 252; Cavender's case.

Id., 281; *McKnight vs. U. S.*, 13 *Id.*, 292.) As a general rule, the Treasurer, as *ex-officio* Commissioner of the Sinking-Fund, can only recognize and deal with the legal title to claims; and the legal title to a judgment does not technically pass by an assignment. On common-law principles, claims against the United States would not be assignable. (*U. S. vs. Robeson*, 9 Pet., 325.)

The act of June 16, 1880, (21 Stats., 285,) requires the Court of Claims to recognize the rights of assignees of *claims* against the District under that act, but makes no provision as to assignees of judgments.

On the contrary, it quite clearly requires the officers of the Government to deal directly with and make payment to the judgment-creditors respectively in person. It provides that—

SEC. 2. All such claims against the District of Columbia shall, in the first instance, be prosecuted before the Court of Claims by the contractor, his personal representatives, or his *assignee*, in the same manner and subject to the same rules, so far as applicable, as claims against the United States are prosecuted therein * * *.

SEC. 5. If no appeal be taken from the judgment and determination of the Court of Claims in cases provided for in this act within the term limited by law for appealing from the judgments of said court, and in all cases of final judgments by the Court of Claims, or on appeal by the Supreme Court where the same are affirmed in favor of the *claimant*, the *sum due thereby shall be paid*, as *hereinafter provided*, by the Secretary of the Treasury: *Provided*, That no payment shall be made except upon the presentation to the Secretary of the Treasury of a copy of said judgment certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court.

SEC. 6. The Secretary of the Treasury is hereby authorized to demand of the Sinking-Fund Commissioner of the District of Columbia so many of the three-sixty-five bonds authorized by act of Congress approved June twentieth, eighteen hundred and seventy-four, and acts amendatory thereof, as may be necessary *for the payment of the judgments*; and said Sinking-Fund Commissioner is hereby directed to issue and deliver to the Secretary of the Treasury the amount of three-sixty-five bonds required to *satisfy the judgments*; which bonds shall be received by *said claimants* at par in payment of such judgments, and shall bear date August first, eighteen hundred and seventy-four * * *.

SEC. 7. In all cases prosecuted under the provisions of this act it shall be the duty of the *claimant*, after the commencement of said actions, to prosecute them in said court diligently * * *. The Secretary of the Treasury *shall pay*, according to the provisions of this act, *the said judgments* from time to time as they may be presented.

The act of March 3, 1881, (21 Stats., 466,) requires the Sinking-Fund Commissioner to “pay the said judgments” in money, “instead of delivering to *said judgment claimants*” the bonds, as provided in the act of June 16, 1880. This requirement contemplates payment directly to *the claimant* in the judgment, or, of course, to his duly authorized at-

torney. It is in consonance with the policy of sections 1778 and 3477 of the Revised Statutes, and avoids difficulties in deciding to whom payment shall be made. (Randolph's case, *ante*, 19.) Though no question as to a claim or lien of attorney of record in a judgment is involved in the present case, it may conduce to justice and obviate difficulties to have such questions settled before the presentation of the judgment for payment. The regulations of the Department provide that—

"In cases certified for payment by the Court of Claims, * * * the persons certified by said court * * * as the attorneys of record shall be regarded as such by this Department, and be entitled to receive the drafts in such cases."

This provision refers only to judgments *against the United States*. As a matter of strict law, neither the Secretary of the Treasury nor the Commissioner of the Sinking-Fund can be required to provide for the payment of fees due attorneys of record. The relations of such attorneys to the Government are so fully considered in Di Cesnola's case, McAllister's case, and Clift's case, *ante*, 161, 172, and 196, respectively, that it will not be necessary to enter upon any further discussion of them in this case. The rules and principles stated in those cases will be adhered to.

II.—The judgment in favor of Campbell cannot be paid until after ninety days from its date. The act of June 16, 1880, (sec. 5,) authorizes payment, "if no appeal be taken, * * * within the term limited by law," which term is ninety days. (Rev. Stats., 707, 708.) No officer of the United States can make a promise or give an assurance, which can be obligatory, that no appeal will be taken. (*Andrae vs. Redfield*, 12 Blatch. C. C., 417; s. c., *nom. Andrae vs. Redfield*, 98 U. S., 225.) Reasons requiring an appeal, which could not have been previously known, may be ascertained on the last of the ninety days.

The judgment does not bear interest at 6 per centum per annum during the ninety days allowed for appeal, nor for any time, by force of the general interest-statute of April 22, 1870, (16 Stats., 91,) or any other law. Interest accrues only by force of a statute, or contract, or usage creating an implied contract. There is no contract or usage which gives interest on this judgment, and the general interest-statute does not apply to it, because the subject of interest is regulated by the act of June 16, 1880. (*Stephani's case*, 1 Lawrence, Compt. Dec., 35; *Richey's case*, *Id.*, 86; *Gordon vs. U. S.*, 7 Wall., 188; *U. S. vs. Sherman*, 98 U. S., 567.)

Interest is given generally as damages for a wrongful refusal to pay money due. There is no wrongful refusal here. The mode of paying

principal and interest, the rate of the latter, and time during which it runs, will be stated hereafter.

III.—The judgments under the act of June 16, 1880, always show the amount of the original claim *at the time* it was “due and payable;” and only *that amount*, with interest at the rate of 3.65 per cent. from August 1, 1874, will be paid. The act of 1880 (21 Stats., 286) requires payment of judgments in 3.65 bonds of the District, which bonds shall bear date August 1, 1874, and the coupons of which shall be detached therefrom from that date “to the day upon which * * * [the] claims were *due* and payable.” Thus, if a party had an original claim “due and payable” August 1, 1875, for \$1,000, on which he recovered judgment August 1, 1880, he would be, under the act of June 16, 1880, entitled to receive a District bond for \$1,000, with coupons for interest from August 1, 1875. This would place such creditor exactly on the same footing with others who had previously received 3.65 District bonds in payment of claims. This whole subject has been elsewhere considered. (Richey's case, 1 Lawrence, Compt. Dec., 100.)

The District appropriation act of March 3, 1881, provides—

“That the Treasurer of the United States, as ex-officio Sinking-Fund Commissioner, is hereby authorized, whenever in his opinion it will be more advantageous for the interest of the District of Columbia to do so, to sell the bonds authorized to be issued under the provisions of the sixth section of the act of the Congress of the United States entitled ‘An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,’ approved June sixteenth, eighteen hundred and eighty, for the satisfaction of the judgments which may be rendered by said Court of Claims under the provisions of said act, *and pay the said judgments* from the proceeds of said sales, instead of delivering to said *judgment claimants* the said bonds as provided for in said act.” (21 Stats., 466.)

This does not repeal the provision of the act of June 16, 1880, fixing the *right* of claimants to recover judgments, or the amount or interest to be paid them. It is not *quoad hoc* a repealing act. It gives the Treasurer, in his capacity as ex-officio Sinking-Fund Commissioner, the right to sell 3.65 District bonds now at a premium, and thus save the premium to the District of Columbia and the United States.

On general principles, judgment-creditors are not entitled to any interest during the ninety days allowed for appeal, nor thereafter for the time required to audit the judgments. The act of 1880, however, shows a clear purpose to place judgment-creditors on the same footing with other claimants who were paid in District bonds; and if no change had been made by the act of March 3, 1881, judgment-creditors would have

been paid in District bonds bearing 3.65 per cent. interest covering the ninety days and the further time required to audit the judgments. The act of 1881 so far changes the mode of payment as to authorize the Treasurer to satisfy the judgments of the Court of Claims either in money or in bonds. If the Sinking-Fund Commissioner shall make payment in *bonds*, judgment-creditors will receive interest continuously from August 1, 1874, or for the time since the date that their claims became due, at the rate of 3.65 per cent. per annum; if in *money*, they will receive interest, at the same rate, to the expiration of ninety days from the date of the rendition of judgment. The Government cannot be required to keep money awaiting the presentation of judgments for payment beyond this period. If judgment-creditors delay the presentation, the fault and the loss of interest will be theirs. Judgment-creditors who may be paid in money are thus placed in the same condition, substantially, as if paid in bonds. It is not to be supposed that Congress intended by the act of 1881 to put them in a worse position as regards interest than if paid in bonds.

IV.—The mode of securing payment is not difficult. If the original act of June 16, 1880, had continued unchanged, and been literally interpreted, it would have required the Secretary of the Treasury to demand 3.65 bonds of the *ex-officio* Commissioner of the Sinking-Fund, and therewith to pay the judgments. In practice they would probably have been paid by the Commissioner. The act of March 3, 1881, authorizes the *ex-officio* Commissioner of the Sinking-Fund to sell the bonds, and, having done so, requires *him* to “pay the said judgments from the proceeds of said sales, instead of delivering to *said judgment claimants* the said bonds as provided for in said act” of June 16, 1880.

Certified copies of judgments are to be presented to the Secretary of the Treasury, by whom they may be submitted for approval directly to the First Comptroller. The latter will, after approval, refer them to the Treasurer, as *ex-officio* Commissioner of the Sinking-Fund, for payment; and, with proper evidence of payment, such copies will become legal vouchers. They may also be referred by the Secretary to the First Auditor, on whose statement a balance may be certified by the First Comptroller. (Randolph's case, *ante*, 12.)

If this course be pursued, the Auditor's statement, the Comptroller's certificate, and the warrant should be so changed from the usual form as to show that payment is to be made by the Treasurer as *ex-officio* Commissioner of the Sinking-Fund, by virtue of the acts aforesaid. There is no statute specifically requiring this. The whole mode of pro-

cedure is subject to such regulations as the Secretary of the Treasury may make.

The claimant is advised that by law the judgment must be paid directly to the judgment-creditor; that it is payable, at the option of the Treasurer of the United States, as *ex-officio* Sinking-Fund Commissioner, either in money or in 3.65 District of Columbia bonds bearing date August 1, 1874, with coupons detached therefrom from that date "to the day upon which" the claim was "due and payable;" and that the judgment is not payable until the expiration of the ninety days allowed for appeal.

TREASURY DEPARTMENT,

First Comptroller's Office, May 6, 1881.

IN THE MATTER OF APPROPRIATION FOR REIMBURSEMENT OF LOSSES SUSTAINED BY THE OSAGE INDIANS.—OSAGE-INDIAN CASE.

1. "Permanent specific appropriations" are exempted from the operation of the act of June 20, 1874, (18 Stats., 110, sec. 5,) directing the Secretary of the Treasury to "cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury."
2. The provision in the Indian appropriation act of March 3, 1877, (19 Stats., 292,) which appropriates \$5,000 "to reimburse the Osage Indians for losses sustained, and in accordance with pledges by their agents," is a *permanent specific appropriation*.
3. Construction given to the act of June 20, 1874; and definition of permanent appropriations and permanent specific appropriations.
4. When a contract has been made during a fiscal year for supplies or services under an annual appropriation act which contemplates a *continuous performance* during and after the year, the money so appropriated may be applied in fulfilling such contract for two years after such fiscal year.
5. But when an annual appropriation act appropriates money distinctively for services or supplies for a fiscal year, such money cannot be applied in paying for services rendered or supplies furnished after the expiration of the year.

"An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and seventy-eight, and for other purposes," approved March 3, 1877, (19 Stats., 271,) provides—

"That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the

purpose of paying the current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with the various Indian tribes, namely:”

The act then makes numerous appropriations; and, under the head of “Miscellaneous,” makes an appropriation (p. 292) “To reimburse the Osage Indians for losses sustained, and in accordance with pledges by their agents, five thousand dollars.”

The question whether a portion of this appropriation, which has remained upon the books of the Treasury Department for more than two fiscal years, should be carried to the surplus fund and covered into the Treasury under the act of June 20, 1874, (18 Stats., 110, sec. 5,) is submitted for the decision of the First Comptroller.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

Section 5 of the act of June 20, 1874, (18 Stats., 110,) provides that from and after July 1, 1874, “the Secretary of the Treasury shall cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury;” but it exempts from the application of this provision “permanent specific appropriations,” and others; and these “shall continue available until otherwise ordered by Congress.”

The question presented for determination is, whether the appropriation of \$5,000 for the reimbursement of the losses sustained by the Osage Indians (19 Stats., 292) constitutes a “permanent specific appropriation.”

A *permanent* appropriation has been defined as one made “for an unlimited period.” (13 Op. Att.-Gen., 292.) A “permanent specific appropriation” is one which requires the money payable by virtue of it to be applied to an object *specifically pointed out by law*, and which may be so applied *at any time in the future*, and not merely for the service of the current fiscal year. It exists when the act of Congress which made it points out the purpose to which it applies, and shows that it was *intended* to be used in the future, without limit as to time. If the object to which it is to be applied has no reference to or connection with the service of any particular year, the appropriation may be construed as permanent, where such intention is apparent in the act making it. If it be for the discharge of an *existing obligation* having no connection with the service of the current year, and not in part discharge of a continuous service, it may reasonably be supposed that

Congress intended the liability to be paid without reference to time. (Wood's case, 1 Lawrence, Compt. Dec., 5; Police case, *Id.*, 57, 72; Canal case, *Id.*, 141; Ashton's case, *Id.*, 168. Opinions of the Attorneys-General: Grundy, February 14, 1839, 3 Op., 415; Legaré, March 15, 1843, 4 Op., 148; Cushing, October 9, 1854, November 2, 1854, 7 Op., 3, 15; Akerman, July 27, 1870, 13 Op., 289; Williams, July 13, 1872, 14 Op., 58. Rev. Stats., 3679, 3681, 3685, 3690, 3691, 3732.) Judging by the tests stated and the authorities cited, the appropriation for the Osages is a permanent specific appropriation.

There is a class of appropriations denominated *annual*, which are of a *continuous nature*; or, rather, where the supplies or services appropriated for have a future continuing value and purpose, and a contract is made *in the fiscal year* for which the appropriation is made, the contract may be extended even after that year, and the supplies or services furnished or rendered in pursuance thereof may be paid for at any time within the two years limited by the act of June 20, 1874, (18 Stats., 110,) after such fiscal year. These are distinguishable from *permanent specific* appropriations. (Arsenal case, 1 Lawrence, Compt. Dec., 147; Richardson's case, *Id.*, 357; 7 Op., 1, 15; 13 Op., 291; act June 20, 1874, 18 Stats., 110, sec. 5, modified by act March 3, 1875; *Id.*, 418, sec. 5; Rev. Stats., *ubi supra*.)

If, *e. g.*, an annual appropriation be made to purchase books for the use of a court, or supplies for a continuous service—as, materials for engraving and printing—and it is clear that Congress contemplated their use for subsequent years, the principles stated will apply. But where services or supplies are, by the terms of an appropriation act, distinctively for a current fiscal year, no continuous operation can be given to the act, except to pay after the year for services rendered and completed, or supplies furnished, during and for the year. (Wood's case, 1 Lawrence, Compt. Dec., 1; James's case, *Id.*, 380.)

The money to reimburse the Osage Indians for losses sustained, as appropriated by the act of March 3, 1877, which remains unexpended, is not to be carried to the surplus fund or covered into the Treasury.

TREASURY DEPARTMENT,

First Comptroller's Office, May 7, 1881.

IN THE MATTER OF THE POWER OF SURVIVOR OF THREE TRUSTEES TO ASSIGN A GOVERNMENT BOND FOR CONTINUANCE.—BOND-ASSIGNMENT CASE.

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1. When a Government bond is inscribed in the name of three trustees, and the nature of the trust is not shown; one trustee dies and another resigns; the sole remaining trustee has power to assign the bond for continuance to the Secretary of the Treasury, or otherwise execute the trust.
 2. Where trustees hold the legal estate in such bond, and so an authority coupled with an interest and also with a trust, the right to execute the trust survives the death or resignation of one or more of the trustees.

United States registered bond No. 7154, for \$5,000, issued under the acts of July 17 and August 5, 1861, (12 Stats., 259, 313,) redeemable after June 30, 1881, and inscribed in the names of "Charles A. Sweet, James S. Putnam, George F. Putnam, *trustees*," has been assigned by George F. Putnam, one of said trustees, to the Secretary of the Treasury, for continuance under Department circular No. 42, of April 11, 1881. (*Vide* circular, *ante*, 219.) James S. Putnam is deceased, and Charles A. Sweet has *resigned* the trust. No purpose of the trust is shown.

The question whether the assignment by George F. Putnam alone is valid for the purpose indicated, has been referred to this office by the Secretary of the Treasury.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

In this case the trustees held the legal estate in the bond, and so had an authority coupled with an interest and also with a trust. In such circumstances, the authority to execute the trust does not fail upon the death of one or two of the trustees. (Berrien, Attorney-General, November 19, 1830, 2 Op., 397; 6 U. S. Stats., 428, Chap. CXV.) In the Bond-Continuance case, *ante*, 218, the leading authorities on this question are collected; and, for a fuller exposition than is here deemed necessary, reference may be had to that case. (See, also, Hannah, *ad.*, *vs.* Carrington *et al.*, 18 Ark., 104; Taylor *vs.* Benham, 5 How., 233; Hill, Trustees, Am. ed., 303, 580; *Re* Marlborough School, 13 Law Journ., N. S., Chanc., 2; 7 Jur., 1047.)

In the case of Doc, dem. Read *vs.* Goodwin, (1 Dowling & R., 259,) analogous in principle to the present case, Mr. Justice Best stated the law to be that, where the authority to convey is vested in trustees, the original number of the trustees does not affect the exercise of the

authority by the survivors, and added: "Whether it is proper that the number of trustees should be filled up, may depend upon circumstances. * * * The number of trustees cannot affect the right to convey, and, these persons having the property vested in them, they may convey it as they think proper." In *Stewart vs. Pettus*, (10 Mo., 755,) the court says: "In the case of joint trustees, the trust survives on the death of one of them. The distinction is between mere powers uncoupled with an interest and trusts. Joint powers, in matters of mere private concern, are extinguished by the death of one of the persons intrusted with it; not so in the case of trusts; they survive to the survivor." (1 Thos.' Coke, 739.) In *Parsons vs. Boyd*, (20 Ala., N. s., 118,) Dargan, C. J., delivering the opinion of the court, says: "It is a well-settled principle of law, that if a power, coupled with a trust, be given to two or more, it may be executed by one who has survived the others." (*Hawkins vs. May*, 12 Ala., 673; *Jackson vs. Burtis*, 14 Johns., 398; *Franklin vs. Osgood*, *Id.*, 553.) In the case of *Bergen vs. Bennett*, (1 Caines' Cases in Error, 16,) Chancellor Kent, for the court, said: "A trust will survive, though no ways beneficial to the trustee. It is the possession of the legal estate, or a right in the subject, over which the power is to be exercised, that makes the interest * * *; and where an executor, guardian, or other trustee is invested with the rents and profits of lands for the sale or use of another, it is still an authority coupled with an interest, and survives." (*Osgood vs. Franklin*, 2 Johns. Ch., 20, 21; *Eyre vs. Countess of Shaftsbury*, 2 P. Wms., 121; *Adams vs. Buckland*, 2 Vern., 514; *Hudson vs. Hudson*, Cas. temp. Talbot, 127; *Lessee of Zebach vs. Smith*, 3 Binn., 73; *Peter vs. Beverly*, 10 Pet., 565; *Shortz vs. Unangst*, 3 Watts & S., 55; Co. Litt., 113a; *Warburton vs. Sandys*, 14 Sim., 631, 632; *Watson vs. Pearson*, 2 Exch., 594; *Jones vs. Price*, 11 Sim., 569; *Att'y-Gen'l vs. Bp. of Litchfield*, 5 Ves., 831; *Att'y-Gen'l vs. Cuming*, 2 Younge & C., 153; *Slater vs. Wheeler*, 9 Sim., 157; *Att'y-Gen'l vs. Glegg*, Amb., 585; *Att'y-Gen'l vs. Floyer*, 2 Vern., 748; *Clay & Craig vs. Hart*, 7 Dana, 8; In the matter of *Stevenson*, 3 Paige, Chan., 420; *King vs. Donnelly*, 5 *Id.*, 46; *Adams vs. Taunton*, 5 Madd., 435.) When there are several trustees, and one disclaims and refuses to enter on the trust, the remaining trustees have authority to execute the trust. (1 Perry, Trusts, 2d ed., sec. 273; *Townson vs. Tickell*, 3 Barn. & Ald., 39; *Ratcliffe vs. Sangston*, 18 Md., 389; *Webster vs. Vandeventer*, 6 Gray, 429; *Trask vs. Donoghue*, 1 Aik. Vt., 373; *Matter of Crossman*, 20 How. N. Y. Prac., 354; *Jones vs. Maffet*, 5 Serg. & R., 523.)

The Government is not bound in such a case as this to inquire into

the character of the trust, which the trustees may not desire to disclose. (Klink's case, 1 Lawrence, Compt. Dec., 247.)

George F. Putnam is competent to make a valid assignment of the bond to the Secretary of the Treasury for a continuance thereof under the conditions of Department circular No. 42.

TREASURY DEPARTMENT,

First Comptroller's Office, May 9, 1881.

**IN THE MATTER OF LIABILITY FOR COSTS AND EXPENSES
IN CRIMINAL CASES REMOVED FOR TRIAL FROM STATE
TO NATIONAL COURTS.—THOMPSON'S CASE.**

1. A soldier in the armies of the United States is "in time of war, insurrection, or rebellion," subject only to the jurisdiction of a general court-martial, as provided in article 58 of the rules for the government of the armies of the United States.
2. When a soldier is, in time of peace, accused of a capital crime, or any offence against the person or property of a citizen of any of the United States, which is punishable by the law of the land, article 59, of the rules referred to, provides that he be delivered over to the civil authority for trial; after which, the United States is not required to defray any of the expenses incident to the prosecution, beyond such as may have been necessarily incurred by the military authorities in delivering the accused to a civil magistrate, or in aiding the officers of justice to arrest him.
3. But where the offence charged was committed in the execution of a military duty, there is an implied obligation on the part of the United States to defend the accused, and to defray all proper expenses incident to his trial, if he asks the Government to defend him. This obligation has been recognized by Congress.
4. Section 299 of the Revised Statutes authorizes district attorneys to make defence in the State or United States courts, as the case may be: (1.) When the United States is interested, but is not a party of record. (2.) When cases are instituted against the officers of the United States, or their deputies, or duly appointed agents, for acts committed or omitted or suffered by them in the lawful discharge of their duties.
5. When a party is indicted for crime, or a criminal information is filed against him, in a State court, and the cause is removed for trial into a circuit court of the United States, the fees of witnesses subpoenaed, under the provisions of section 878 of the Revised Statutes, for the defence, together with those for the issue and service of subpoenas on such witnesses, are to be paid by the United States. The State is alone responsible, in such case, for the costs and expenses of the prosecution.

The marshal of the United States for the district of West Virginia has submitted for decision to the First Comptroller the question whether, when a party is indicted in a State court for crime, and the

trial is removed to a circuit court of the United States, the fees of the defendant's witnesses, and of the marshal for summoning them, are to be paid by the United States.

The question relates to the case of the State of West Virginia *vs.* Isaac Thompson, which was removed from the State court into the circuit court of the United States for the district of West Virginia. Thompson was under indictment for murder, found against him in 1878.

On the 11th of February, 1879, the following order was made by the circuit court:

"STATE OF WEST VIRGINIA <i>vs.</i> ISAAC THOMPSON.	}	<i>On an Indictment for Murder removed from Marion County, W. Va.</i>
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"This day came the district attorney of the United States, as well as the defendant by his counsel, A. J. Boreman, Esq., (the defendant not being present,) and on motion of the said A. J. Boreman, it is ordered, that the witnesses mentioned in the affidavit filed by the defendant in this cause at a former term be summoned by the marshal of this court at the costs of the United States, to appear before this court at a trial to be had on the 25th day of this month."

It appears, from the statement of the case submitted, that the homicide charged against Thompson was committed during the late rebellion, while he was engaged in the lawful discharge of his military duty as a soldier of the armies of the United States.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

There is no provision in the Revised Statutes of the United States for the removal of a criminal prosecution in such a case as that of Isaac Thompson from the State to the National courts. Section 641 authorizes the removal of criminal prosecutions commenced in a State court "for any cause whatsoever, against any person who is denied or cannot enforce, in the judicial tribunals of the State, or in the part of the State where such * * * prosecution is pending, *any right secured to him by any law providing for the equal civil rights of citizens of the United States*, * * * or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed *by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law.*" Section 643 authorizes the removal of criminal prosecutions commenced in State courts against *revenue officers or persons acting under or by their authority, on account of any act done under color of office or of any revenue law*, or against any officer of the United States, or other person,

on account of *any act done under the provisions of Title XXVI* of the Revised Statutes, "*THE ELECTIVE FRANCHISE*," or "*on account of any right, title or authority claimed by such officer or other person under any of the said provisions.*" Neither of these sections applies to the case presented.

Section 5 of the act of March 3, 1863, (12 Stats., 756,) as amended by the act of May 11, 1866, (14 Stats., 46,) provided for the removal of criminal prosecutions commenced in State courts against officers, soldiers, and other persons, *for acts done during the rebellion under military authority.* No part of the act of 1863 appears to have been incorporated in the Revised Statutes. It is therefore presumed to be still in full force, and to have been the authority relied on for the removal of the case under consideration.*

Isaac Thompson, who is charged with the crime, was, at the time of the commission of the homicide, a soldier in the armies of the United States; and, being such, was, "in time of war, insurrection, or rebellion," subject only to the jurisdiction of a general court-martial, as provided in article 58 of the rules for the government of the armies of the United States. (Rev. Stats., sec. 1342, p. 235.) In case of trial by court-martial, the United States would defray all expenses incident to it. When a soldier is, in time of peace, accused of a capital crime, or any offence against the person or property of a citizen of any of the United States, which is punishable by the law of the land, article 59, of the rules referred to, requires that he be delivered over to the civil authority for trial; after which, the United States is not required to defray any of the expenses incident to the prosecution, beyond such as may have been necessarily incurred by the military authorities in delivering the accused to a civil magistrate, or in aiding the officers of justice to arrest him. (Steiner's case, 6 Op. Att.-Gen., 413; *Ex parte McRoberts*, 16 Iowa, 600, App.) But where the offence charged was committed in the execution of a military duty, there is an implied obligation on the part of the United States to defend the accused, and to defray all proper expenses incident to his trial, if he asks the Government to defend him. This obligation has been recognized by Congress. Section 299 of the Revised Statutes authorizes district attorneys to make defence in the State or United States courts, as the case may be: (1.) When the United States is interested, but is not a party of record.

* A history, by E. W. M. Mackey, of the legislation for the removal of criminal causes from the State courts to National courts, is given in the "Criminal Law Magazine" for March, 1880, (Jersey City, N. J.,) in which authorities are cited to show that it was within the power of Congress to provide for criminal as well as for civil causes, as was done in sections 641 and 643 of the Revised Statutes. (American Law Review, N. S., 1880, Vol. I, p. 379.)

(2.) When cases are instituted against the officers of the United States, or their deputies, or duly appointed agents, for acts committed or omitted or suffered by them in the lawful discharge of their duties.

This provision is taken from section 12 of the act of August 16, 1856. (11 Stats., 50.) Before its enactment, Attorney-General Cushing, on November 14, 1853, clearly expounded this obligation to make defence:

“It is the constitutional duty of the President ‘to take care that the laws be faithfully executed.’ This by no means implies that he shall interpose in a matter of mere individual and private litigation. But cases do sometimes occur between private individuals, or more frequently where a public officer is a party, in which a public interest is incidentally involved, rendering it lawful and advisable that counsel be employed therein by the United States. And it may be a case of public concernment, though no property of the United States be involved; for the integrity of the Constitution and conservation of the laws are a matter of much greater importance to the Government than the defence of a parcel of the national domain, or the collection of duties on a cargo of imported merchandise. In any such case, it is a question of discretion on the part of the President, or a head of Department, to employ counsel for the United States or not, according to his judgment of the particular circumstances, without its being possible to lay down any more specific general rule on the subject. I have no doubt of the power of the President in such emergencies; it is of familiar practice in the daily business of the Government.

“Examples of this are not wanting in cases where no officer of the United States is a party, and no interest of the United States directly concerned, other than the general security of the Constitution, or the peace and honor of the Government.” (6 Op., 220.)

To make a defence in such a case, costs or expenses are necessarily incurred. In the opinion cited, the Attorney-General points out that the provisions of section 11 of the act of August 31, 1852, (Rev. Stats., 846,) expressly recognize the power of the President to allow payment of costs and expenses so incurred. Section 11 provides, in relation to such costs, that—

“The President of the United States is authorized to allow the payment thereof, under the special taxation of the district or circuit court of the district in which said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary.”

In this class of cases the expenses and fees for services are to be assimilated, as nearly as may be, to those provided by law for similar services in cases in which the United States is a party. (Rev. Stats., 299.) The *words* of these acts, taken literally, would include officers, their deputies, or duly appointed agents only; but the intention of the lawmaker always controls the mere words of a statute. The true spirit and intent of these provisions is to afford means of defence to all per-

sons in the service or employment of the Government when proceeded against by State, county, or municipal authority, for acts done in the line of their public duty or employment, or incident thereto. The defendant may waive this means of defence or demand it as he pleases. In the former event, the United States is not liable for costs incurred; in the latter event, the Government assumes the defence, and bears all expenses that may be taxed, as provided in the statute.

The provisions of section 878 of the Revised Statutes, relative to witnesses for indigent defendants, apply, in terms, only, "to any person indicted in a court of the United States." In Thompson's case the circuit court held—as appears by the order above quoted—that these provisions should be construed to include a person indicted in a State court when the indictment is removed to a United States court. In the particular case under consideration the ruling of the court referred to was unquestionably correct, and whether it was based on section 878 or not is a question not material, since Thompson was entitled to have the expense of his defence defrayed by the National Government. The scope of this section may be ascertained by reference to that most reasonable and humane provision of the Constitution which secures to persons accused of crime, in all prosecutions in the National courts, "compulsory process for obtaining witnesses in" their favor. (Art. VI, Amendment.) Construing the section in the light of this provision, it must be held to apply to all criminal prosecutions in the National courts, whether commenced in these courts or those of the States, and whether the form of proceeding be by indictment or by information.

In the case of Thompson, it seems that the court directed the district attorney to prosecute the indictment found against him. It may be that this direction was proper; but it might well be questioned whether, if the offence charged was committed in the line of duty, the United States should have assumed the prosecution. In *Strauder vs. West Virginia*, on an indictment for murder in the State court, the Attorney-General of the United States appeared for Strauder in the Supreme Court of the United States when the matter was brought before it on writ of error, (100 U. S., 304;) as he also did for Davis, indicted for murder, in the case of *Tennessee vs. Davis*, (*Id.*, 260,) and for the Hon. Alexander Rives, in the case of *Virginia vs. Rives*, (*Id.*, 314.) The defendant was probably ignorant of his rights. If so, it was all the more reasonable that he should have been *defended** instead of prosecuted.

* So held in *State of Delaware vs. Emerson*, 8 Federal Reporter, Sept. 1881, p. 411. [St. Paul, Minn.]

In no case do the honor of the United States, the integrity of the Constitution, the conservation of the laws, and sound public policy more require or demand a defence by the Government, than in that of a soldier who, having volunteered for the defence of an imperilled Nation, its honor, its Constitution, and its laws, is prosecuted for acts done in time of war, in the line of, and perhaps imperatively required by, his military duty and allegiance. The statutes for the removal of suits and criminal proceedings from the State to National courts assume that for some reason justice requires a trial in the courts of the United States; and in certain localities there may have been such hostility to soldiers as to justify the provisions of the act of 1863 above referred to. (*Ex parte Virginia*, 100 U. S., 364.)

In civil suits transferred from the State to the National courts, the respective parties thereto appear in the latter as well as in the former courts by their own proper attorneys. If the State of West Virginia were to enter suit against a foreign corporation in the Supreme Court of the United States, it would appear by its own attorney-general, or other attorney, and he would conduct the suit for the State. Neither the Attorney-General nor the district attorney of the United States would, *ex officio*, have any right to appear for the State. Similarly, when a State prosecutes a party who has been indicted in its own court, for a crime or other offence committed against its own laws, and the cause is removed for trial to the United States circuit court, the State appears by its own proper prosecuting attorney. The United States district attorney cannot, *ex officio*, prosecute in such a case. His official duty, as prescribed in section 771 of the Revised Statutes, does not, in criminal prosecutions, extend beyond crimes and offences cognizable under the authority (*i. e.*, statutes) of the United States. Indictments for all such crimes and offences conclude with the words "against the peace and dignity of the United States." The removal of an indictment for murder, found in a State court, to the United States circuit court does not, within the meaning of section 771, make the crime charged one cognizable under the authority of the United States. It still remains a crime against the State, to be prosecuted or *nolle pros'd*, as the State may please. The indictment still concludes "against the peace and dignity of the State," (or "Commonwealth.") It cannot be amended or modified in any material part in the United States court. If quashed, the grand jury of the United States cannot find another true bill for the offence charged. If there be a trial and conviction, the court must look to the laws of the State, and *not to those of the United States, for the penalty*. The sentence of the law

being pronounced, the custody of the convict and the execution of the sentence belong, by all rules of reason and analogy, to the State. Thereafter, reprieve or pardon of the convict can be granted only by the chief executive of the State, for he alone can pardon an offence committed against the peace and dignity of his State.

Obviously, therefore, in cases like the one under consideration, the United States cannot appear in the character of a prosecutor. Its attorney cannot, *ex officio* or by order of court, substitute himself for the State prosecuting officer. It is only when the nature of the case requires a *defence* on the part of the United States, that its attorney can officially appear; and in that case all necessary and proper expenses incurred in making the defence are borne by the United States. The prosecution must bear its own costs and expenses, for these cannot be taxed against the United States, in any event; and by analogy no costs can be taxed by the circuit court against the State.

The object sought by the statutes passed for the removal of suits and criminal proceedings from the State to the National courts, was to secure a fair and impartial trial, under an equal administration of the laws applicable thereto. The relations of the parties to the proceedings, the character of the crime charged, or action brought, the laws governing the rights and wrongs of the case, are not, and were not, intended to be modified or in any way affected by the removal of the proceedings. The only change effected is simply this: The National Government, for the purpose of securing an impartial trial, substitutes its own judicial tribunal for that of the State. Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *Cohens vs. Virginia*, (6 Wheat., 386,) ably sets forth the necessity of this jurisdiction in cases wherein a State prosecutes an individual who is entitled to the protection of the National Government. He says: "It would be hazarding too much to assert, that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and for salary on the will of the legislature. The Constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that Constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a State shall prosecute an individual who claims the protection of an act of Congress."

The act of Congress (sec. 771, R. S.) made it the duty of the district attorney to appear in behalf of the defendant. The fact that he appeared

as the prosecuting officer does not affect the main question under consideration. It is clear that the United States is liable for "the cost incurred by the process and the fees of the witnesses" named in the defendant's affidavit, and included in the order of the court above quoted. The marshal is, therefore, authorized to charge in his accounts the statutory compensation for summoning the witnesses, and to pay such witnesses their lawful fees.

The decision herein made on the main point involved conforms to the reasoning of the Supreme Court in *Tennessee vs. Davis*, 100 U. S., 257; *Strauder vs. West Virginia, Id.*, 303; *Virginia vs. Rives, Id.*, 313; *Ex parte Virginia, Id.*, 339.

In one of the cases cited, objection was made to the jurisdiction on the ground that the statute did not determine, as to costs, "whether the amount would be chargeable to the United States or to the State." But the court held the objection not well taken; and it was fully answered by saying that "the General Government should take cognizance of the case and try it in its own court, according to *its own forms of proceeding.*" (*Tennessee vs. Davis, Id.*, 272, 297.)

There can be no *judgment* against the United States for costs. The Government allows "compensation" to its officers for their services and in certain cases pays the costs of witnesses for the defendant.

The proper costs legitimately chargeable to the United States, when duly certified, will be paid.

TREASURY DEPARTMENT,

First Comptroller's Office, May 10, 1881.

IN THE MATTER OF LIABILITY FOR COSTS AND EXPENSES IN CRIMINAL CASES REMOVED FOR TRIAL FROM STATE TO NATIONAL COURTS.—STRAUDER'S CASE.

1. Section 642 of the Revised Statutes requires the marshal, where the writ of *habeas corpus cum causa* therein provided for has been served, "to take the body of the defendant into his custody to be dealt with" in the United States court, "according to law, * * *". Thenceforth, until duly discharged, the defendant is a prisoner, under process of the United States, in the custody of the marshal.
2. Section 5536 provides that "all the expenses attendant upon the transportation from place to place, and upon the *temporary* or *permanent* confinement of persons *arrested* or *committed* under the laws of the United States, as well as upon the execution of any sentence of a court thereof respecting them, shall be paid out of the Treasury of the United States, in the manner provided by law."

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- 3. The opinion of the Attorney-General, that the costs of the *habeas corpus* under section 642 of the Revised Statutes are to be paid as in cases prosecuted by the United States, concurred in.
- 4. On the removal of criminal proceedings from State to National courts, the marshals are entitled to be compensated for retaining the prisoners in custody under United States process at the same rate as if the prisoners had been originally taken at the suit of the United States.
- 5. On such removal, where there is no obligation on the part of the United States to aid the defendant, the costs incurred in the defence and prosecution of the case are not, except for witnesses attending under the provisions of section 878 of the Revised Statutes, and for the issue and service of process for such witnesses, chargeable to the National Government. The State is alone responsible for the costs of the prosecution.

The marshal of the United States for the district of West Virginia has submitted for decision to the First Comptroller the question whether, when a party is indicted in a State court for crime, and the trial is removed to a circuit court of the United States, and the accused is taken from the custody of the sheriff into that of the United States marshal, the expense of supporting the prisoner while held under process of the National court is to be borne by the United States.

The question relates to the case of Taylor Strauder, a colored man, who was indicted in the circuit court of Ohio County, West Virginia, in October, 1874, for murder, and whose case was, under the provisions of section 641 of the Revised Statutes, removed for trial into the circuit court of the United States for the district of West Virginia.* Strauder was taken from the custody of the sheriff into that of the United States marshal, by virtue of a writ of *habeas corpus*, issued under section 642 of the Revised Statutes. He was, under authority of the United States court, committed to jail, where he remained until his trial and discharge from custody.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

It is not shown that Strauder was, at the time of the commission of the crime charged against him, in the service or employment of the United States; but whether he was or was not is immaterial to the merits of the case. The question is: Are the marshal's fees and expenses for taking and keeping Strauder in custody, under process of the National court, chargeable to the United States?

Section 642 of the Revised Statutes requires the marshal, where the writ of *habeas corpus cum causâ* therein provided for has been served,

* See *Strauder vs. West Virginia*, 100 U. S., 304.

“to take the body of the defendant into his custody to be dealt with” in the United States court, “according to law, * * *.” Thenceforth, until duly discharged, the defendant is a prisoner, under process of the United States, in custody of the marshal. Section 5536 provides that “all the expenses attendant upon the transportation from place to place, and upon the *temporary* or *permanent* confinement of persons *arrested* or *committed* under the laws of the United States, as well as upon the execution of any sentence of a court thereof respecting them, shall be paid out of the Treasury of the United States in the manner provided by law.”

The expenses of the confinement of a person arrested on the *habeas corpus* in this case are to be paid by the United States precisely as in cases in which the United States is prosecutor. This is the effect of the statute, which declares that the accused is “to be dealt with in said circuit court *according to law*.” Unless the statute is so construed, there is no provision of law for the payment of “costs;” and it is not to be presumed that Congress has provided no means of paying them, if the statute can, as it may fairly, be construed as making such provision. If this be not the proper construction, then there is no provision for issuing process in or trying a transferred case. The Attorney-General, in an opinion of May 8, 1878, contained in a letter to the First Auditor, and not included among the published Opinions, held that the costs of the *habeas corpus*, under section 642 of the Revised Statutes, are to be paid as in cases prosecuted by the United States. The opinion is fully concurred in.

As to any costs that may have been incurred in Strauder's defence, other than for witnesses subpœnaed under section 878, and for the issue and service of process upon them, it is not, in the absence of facts showing an obligation on the part of the United States to aid the defendant, intended to be decided that the Government is liable for their payment; but as to the costs of the prosecution, it is clear that the State is alone responsible for their payment. (Thompson's case, *ante*, 250.)

The inquiry of the marshal is answered in the affirmative.

TREASURY DEPARTMENT,

First Comptroller's Office, May 10, 1881.

IN THE MATTER OF REFUNDING EXCESS PURCHASE-MONEY OF PUBLIC LANDS SOLD AT DOUBLE MINIMUM PRICE.— ALLSPACH'S CASE.

1. Inaccurate use of the word "warrant" in some statutes where "requisition" is meant.
2. The Second Comptroller countersigns no "warrants" for the payment of money out of the Treasury. The First Comptroller alone countersigns such warrants.
3. The Second Comptroller countersigns *requisitions* of the heads of those Executive Departments of which he revises the accounts for the payment of balances certified by him. After such countersigning by the Second Comptroller, a warrant for payment must still be issued by the Secretary of the Treasury, and this warrant must be countersigned only by the First Comptroller.
4. When a statute makes a specific enumeration of classes of persons as beneficiaries under it, all others are by inference excluded.
5. The act of June 16, 1880, (21 Stats., 287, sec. 2,) provides that, in cases "where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land-grant, the excess of \$1.25 per acre shall * * * be refunded to [1] the purchaser thereof, or to [2] his heirs, or [3] assigns."
6. The proper construction of this provision is that—
 - (1.) The original purchaser from the United States is entitled to the refund so long as he has not conveyed or assigned the land.
 - (2.) If he die before the refund is made, his heirs at law, so long as they have not conveyed the land, are entitled to it. Executors and administrators are not enumerated in the statute, and have no claim in any case.
 - (3.) When the original purchaser from the Government has conveyed the land before a refund is made to him, the refund will be made to his vendee.
7. The *claim* for a refund is not assignable as one separate and distinct from the land. The statute attaches it to the land, and vests it in the holder of the title thereto.
8. Congress has power to prescribe a course of descent or distribution in the event of the death of a party entitled to money under a law of the United States.
9. Accounting officers deal with legal rights, and not with equities; but a conveyance, sufficient in form to pass a legal estate in land, vests in the vendee a right to the refund provided for in the act of June 16, 1880.
10. In the absence of the statutory provision for repayment, a claimant of money paid for land in excess of the legal price might have sued the United States in the Court of Claims for its recovery. If an appropriation for refunding it had been made by Congress, the proper accounting officers could have stated an account for its payment, and a suit in the Court of Claims would have been unnecessary.

11. If a locator of land entitled to a repayment of excess purchase-money had sold and conveyed his land prior to the act of June 16, 1880, his vendee would not be entitled to the refund. The rights of parties would have remained as at common law.

The act of Congress approved July 26, 1866, (14 Stats., 290,) granted to the State of Kansas, for the use and benefit of the Union Pacific Railroad Company, southern branch, in the construction and operation of a railroad from or near Fort Riley, Kansas, down the valley of the Neosho river to the southern line of the State, every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of the road to be constructed, and not exceeding in all ten sections per mile. Section 2 of this act provided that the lands not so granted, and remaining within the ten-mile limit of the road, "shall not be sold for less than double the minimum price of public lands when sold," except that *bonâ fide* settlers under the pre-emption laws, and settlers under the homestead act, are exempted in the cases therein provided from the limitation of this provision. (See Rev. Stats., 2357.)

The act of June 16, 1880, (21 Stats., 287, sec. 2,) provides that—

"In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land-grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns."

November 12, 1870, Nathan Allspach entered at the land office at Augusta, Kansas, the southwest fractional quarter of section 30, township 25 south, of range 1 west, $164\frac{3}{10}$ acres, at \$2.50 per acre, which price he paid, being the double minimum price for land within the limits of said railroad land-grant. It was subsequently ascertained that the land so entered was not within the ten-mile limit of such grant. October 4, 1880, Allspach made application to the Commissioner of the General Land Office for a refund of the excess payment of \$1.25 an acre.

November 13, 1880, the Commissioner of the General Land Office, by report No. 35076, to the First Comptroller, certified that he had ex-

amined and adjusted an account between the United States and said Allspach, and found a balance of \$206 due to him as overpayment on the price of the land entered by him.

November 29, 1880, the First Comptroller, by letter, required Allspach to show that he had not assigned or incumbered the land. January 26, 1881, Allspach answered that he had sold the land, but not his interest in any money due him from the Government by reason of excess in payment. The sale was made July 28, 1880, to William Little for \$1,700.

The question arises, whether the excess payment is to be refunded to Allspach, the original purchaser of the land, or to Little, the party to whom he sold and conveyed it.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The act of Congress approved June 16, 1880, for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase-money, and commissions paid on said entries of public lands, (21 Stats., 287,) provides that—

“SEC. 2. * * * In all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land-grant, the excess of one dollar and twenty-five cents per acre shall * * * be repaid to the *purchaser thereof, or to his heirs or assigns.*”

“SEC. 3. The Secretary of the Interior is authorized to make the payments herein provided for, out of any money in the Treasury not otherwise appropriated.

“SEC. 4. The Commissioner of the General Land Office shall make all necessary rules, and issue all necessary instructions, to carry the provisions of this act into effect; and for the repayment of the purchase money and fees herein provided for the Secretary of the Interior shall draw his warrant on the Treasury, and the same shall be paid without regard to the date of the cancellation of the entries.”

The provision contained in section 3 of this act would, if construed literally, work a repeal, *pro tanto*, of the provisions of sections 191, 236, 248, 269, and 277 of the Revised Statutes, prescribing the mode and conditions of making payments out of the Treasury. Since, however, it does not in terms profess to effect a repeal which would, to the extent of its application, revolutionize the practice of the Treasury Department, it cannot be supposed that Congress had such an intention, and the provision will therefore be construed with reference to the organic laws of the Treasury accounting system.

The word “warrant,” in section 4 above quoted, means “*requisition.*”

It is to be construed with reference to another provision of the Revised Statutes, which says that—

“SEC. 444. The Secretary of the Interior shall sign all requisitions for the advance or payment of money, out of the Treasury, upon estimates or accounts for expenditures upon business assigned by law to his Department; subject, however, to adjustment and control by the proper accounting officers of the Department of the Treasury.”

This word “warrant” is frequently but incautiously used when the word “*requisition*” is meant. (Bender's case, 1 Lawrence, Compt. Dec., 338.) It is so used in section 273 of the Revised Statutes; and it is also inaccurately used in section 305:

“The Treasurer shall * * * disburse * * * [the moneys of the United States] upon warrants * * * countersigned by *either* Comptroller.”

The Second Comptroller does not countersign *any warrant* for the payment of money. The First Comptroller alone does this. (Rev. Stats., 248, 269.) The Second Comptroller countersigns *requisitions* of the heads of those Executive Departments of which he revises the accounts for the payment of balances certified by him. (Rev. Stats., 3673.) After such countersigning by the Second Comptroller, a warrant for payment must still be issued by the Secretary of the Treasury, and this warrant must be countersigned by the First Comptroller alone. (Rev. Stats., 248, 269.)

Nathan Allspach paid to the receiver of the land office at Augusta, Kansas, on the entry of a tract of land, \$206 in excess of the amount which would have sufficed if it had been known that the land entered was not within the limits of the railroad land-grant. After entry, he sold and conveyed the land, and, so far as appears, nothing was said to the second purchaser as to the rate per acre paid by Allspach to the receiver, or as to any claim upon the Government for repayment of the excess. Allspach now asks repayment to himself of the excess, under the provisions of the act of June 16, 1880. The question to be decided is, whether the repayment should be made to him or to the second purchaser. The statute provides that the excess shall be repaid to the person who made the entry of the public land—that is, the person who purchased the land from the Government—“or to his heirs or assigns.” (21 Stats., 287.) In enacting this law, Congress foresaw that a purchaser of public land from the Government, entitled to repayment of excess of the purchase-money, might sell the land or die intestate before such repayment. In each of these contingencies conflicting claims to the money repayable might arise. In such case the rule of the common law, even if adopted in all the States, might not be that which

Congress would deem most consistent with right or public policy. In default of the prevalence of the common-law rule, the law would inevitably differ in the several States, and the executive officers of the Government would be required to administer, in a single class of liabilities, different laws—difficult, perhaps, in many cases to be understood. The transaction of the public business should, so far as possible, be controlled or regulated by laws uniform in their operation and effect; and for these reasons Congress has established a uniform law, applicable to all transactions growing out of the entry, purchase, sale, and assignment of public lands. In the absence of such uniformity, a variety of perplexing questions would be constantly embarrassing the executive officers and delaying justice to honest claimants.

If a purchaser of land from the Government should die intestate before receiving repayment of excess purchase-money, his land would pass by descent to his heirs-at-law; and the question would arise whether the excess purchase-money should be repaid to the *heirs* or to the *administrator*. If the original purchaser, dying testate, had *devised* the land, the like question would arise as between the *devisee* and the *executor*. Difficulties might not infrequently arise in the *construction* of last wills, as also regarding the authenticity or validity of wills discovered a considerable time after the death of the testator. If a testator had bequeathed the right to recover from the United States the excess purchase-money, similar difficulties and delays would result. In case of a purchaser dying *intestate*, the right of reclaiming the excess payment would, at common law, go to the administrator. In case of a *devise* of the *land*, with no testamentary provision as to the excess payment, this would, at common law, go to the executor. (Rawle on Covenants, 4th ed., 318; Touchstone, 175; Fitz. Nat. Brev., 145; Com. Dig. "Covenant" B. 1, "Administration" B. 13; Wentworth's Office of Exec., 14th ed., 159, 160; 2 Williams, Executors, 6th Am. ed., 863, [786;] Wheatley *vs.* Lane, 1 Saund., 211a; Holbrook *vs.* White, 13 Wend., 591; Tobey *vs.* M'f's Nat. Bank, 9 R. I., 239; Lee *vs.* Chase, 58 Me., 432; Jerningham *vs.* Herbert, 4 Russ. Chanc. Cas., 388; Allen *vs.* Anderson, 5 Hare, 163; Cust *vs.* Goring, 18 Beav., 383; Devon *vs.* Powlett, 11 Vin. Abr., 133, tit. "Executors," pl. 27; Carr *vs.* Roberts, 5 B. & Ad., 78; Pease *et al.*, Ex'rs, *vs.* Mead, Hob., 9, 10; 1 Roll. Abr., "Executors," X, pl. 2.)

The person who has purchased the land is the assignee in law. (Pease, &c., *vs.* Mead, Hob., 9; Wentw. Off. Ex., 14th ed., 215; Iremonger *vs.* Newsam, Latch, 261; 1 Roll. Abr., 915, "Executors," X, pl. 1.)

It is to be presumed that Congress used the phrase "to the purchaser thereof, his heirs or assigns," with a distinct purpose to settle

rights as to the three classes of persons named alternatively (1) the *purchaser*, or (2) his *heirs*, or (3) his *assigns*. These words cannot be treated as inoperative or unmeaning; effect must be given, so far as practicable, under the rules of construction, to every word of a statute. (*Leversee vs. Reynolds*, 13 Iowa, 310; *James vs. DuBois*, 1 Harrison, N. J., 285, 293; *Hutchen vs. Niblo*, 4 Blackf., 148; *Broom's Leg. Max.*, 569, 585.)

"It is," say the justices of the supreme judicial court of Massachusetts, (22 Pick., 573., Op.,) "a sound rule of construction, that every clause and word of a statute shall be presumed to have been intended to have some force and effect." A statute ought, if practicable, to be so construed that "no clause, sentence, or word shall be superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent." (*King vs. Berchet*, 1 Shower, 108; *Stevens vs. Duckworth*, Hardres, 344.)

When the statute says that repayments shall be made to (1) the purchaser, or (2) his heirs, or (3) his assigns, this must be deemed an enumeration of *all* the classes of persons who can, in the alternative, become entitled thereto. The authority to make repayment exists by force of the statute; it is to be made to those only who are therein named, according to the maxim *Expressio unius est exclusio alterius*. (*Potter's Dwarrris on Statutes*, 275; 11 Rep., 59, 64.)

The parties so entitled being thus ascertained, the inquiry arises: Under what circumstances shall payment be made to (1) the original purchaser, or (2) the heirs, or (3) the assigns?

1. The original purchaser from the Government is entitled to repayment of the excess purchase-money, if he have not conveyed or assigned the land.

2. If the original purchaser, not having sold the land, die before the refund is made, his heirs-at-law will be entitled to it, if they have not sold or conveyed the land. The executor or administrator can in no event be entitled to the refund, being excluded by the terms of the statute enumerating those who shall be so entitled.

When a balance is certified by the First Comptroller, or even a warrant for payment is issued in favor of the original purchaser, if the latter die before payment, no right passes to an administrator to receive the money, and no testamentary disposition can be made of it. No assignment of the *right of repayment*, which is not incident to a transfer of the land, can be made by contract or last will and testament. This is expressly prohibited by the statute. (*Rev. Stats.*, 3477; *Safford & Co.'s case*, 1 Lawrence, Compt. Dec., 287.)

The act of June 16, 1880, operates *pro tanto* as a rule of descent and transfer of property, but it does not modify section 3477 of the Revised Statutes. There is, so far as the assignment of a *claim* to a refund, as separate and distinct from the land, is concerned, no express or implied repeal of the general prohibition directed against the assignment of claims upon the United States. Like the interest due on a bond, which accrues to the legal owner of it, the right to a refund inheres, by force of the statute, in the legal owner of the land. It descends to the heirs or passes to the assignee, as the case may be, with the land, like an incorporeal hereditament.

3. When, before a refund is made, the original purchaser from the Government has conveyed such legal title as he may have to the land he has entered, his vendee becomes vested with the right of repayment. The word "assigns" in the statute means the party holding the legal title, or such title as the vendor can make. The right of repayment passes with and follows the legal title to the land and vests in the holder.

The word "assigns" must have been used for *some* purpose. It cannot mean an assignee of the *claim* to a refund, because that claim is not *per se* assignable by *any act of the claimant*. It must needs mean, then, the assignee of the *land*, who acquires the right of repayment by operation of the statute.

In the case of *Mattoon vs. Young*, 45 New York Reports, 700, the word "assignee" was held to include "grantee." (See Hill on Trustees, 2 Am. ed., [473,] 689; *Stoddard vs. Smith*, 11 Ohio St., 581; *Davies vs. Lowrey*, 15 Ohio, 656.)

The United States, by the act of June 16, 1880, assumes the position of a vendor of land who, by mistake, has been paid more than the proper amount of purchase-money, and who is in law bound to refund. The sale was made by the Government on its *implied warranty* that the land sold was within the ten-mile limits of a railroad land-grant, and hence rendered more valuable by the proximity of a railroad. Some covenants of a vendor "run with the land" to heirs and assigns. This is true of a covenant REAL, which, whether broken or not in the lifetime of the ancestor, descends upon the heir, instead of passing to the executor or administrator. Covenants *in presenti* do not run with the land, but, being broken at the moment of their creation, are turned into mere rights of action in favor of the covenantees or their personal representatives, and can pass neither to heirs, devisees, nor subsequent purchasers. (Rawle on Covenants, 4th ed., 318; *Lucy vs. Levington*, 1 Levinz, 26; *Morley vs. Polhill*, 2 Ventris, 56; *Smith vs. Simonds*, Comberbach, 64; *Raymond vs. Fitch*, 2 Crompt., M. & R., 588; s. c., 5 Tyrwhitt, 985; *Ricketts vs. Weaver*, 12 Mees. & W., 718; *Young vs.*

Raincock, 7 Com. Bench, 310; Kingdon *vs.* Nottle, 1 Maule & S., 355; s. c., 4 *Id.*, 53; Jones *vs.* King, 4 M. & S., 188; s. c., *nom.* King *vs.* Jones, 5 Taunton, 418.)

If it be conceded that the obligation of the Government, in the nature of an implied covenant, is in this case *in presenti*, and that in consequence, as also upon *general principles*, the right to a repayment of the excess purchase-money does not run with the land, still, Congress had authority to give to the obligation any effect which it should deem proper. Congress has, in such cases, authority to annex conditions to any obligations which the Government may assume. No State law can prescribe limits to this authority. (Safford's case, 1 Lawrence, Compt. Dec., 285.) The act of Congress of June 16, 1880, specifies the parties who, in the event of death or of a sale of the land, shall succeed to the right of the original purchaser. Where the words of the statute are free from ambiguity they cannot be disregarded. (L. L. and G. R. R. Co. *vs.* United States, 92 U. S., 751.)

A power to execute a trust, accompanied with a grant of title, may be given to a donee and to his executors, administrators, and heirs. (1 Perry on Trusts, 2d ed., secs. 199, 340, 410; 2 *Id.*, sec. 495; Hill on Trustees, 2d Am. ed., 73; Bardswell *vs.* Bardswell, 9 Sim. 319; Titley *vs.* Wolstenholme, 7 Beav., 425; Saloway *vs.* Strawbridge, 1 Kay & J., 371; s. c., 7 DeG., M. & G., 594; Ockleston *vs.* Heap, 1 DeG. & Sm., 642; Mortimer *vs.* Ireland, 6 Hare, 196; s. c., 11 Jur., 721; Ashton *vs.* Wood, 3 Sm. & Gif., 436; Hall *vs.* May, 3 Kay & J., 585; Lane *vs.* Debenham, 11 Hare, 188; Saunders *vs.* Webber, 39 Cal., 287.) By analogy, the right to a refund of the excess purchase-money of land, as an *incident* of the latter, may pass by assignment.

A trust instrument might be so drawn as that a trustee could assign the right to administer it. (How *vs.* Whitfield, 1 Vent., 338; Bradford *vs.* Belfield, 2 Sim., 264; Montague *vs.* Dawes, 14 Allen, 369; see Milnor *vs.* Metz, 16 Pet., 224; Saloway *vs.* Strawbridge, *ubi supra*; 2 Perry, Trusts, secs. 494, 495; Lewin, Trusts, [431.] n. 1; Cooke *vs.* Crawford, 13 Sim., 98; Mortimer *vs.* Ireland, *supra*; Wilson *vs.* Bennett, 5 DeG. & Sm., 475; Stevens *vs.* Austen, 7 Jur., N. S., 873; Burt's Est., 1 Drew., 319; Titley *vs.* Wolstenholme, Ockleston *vs.* Heap, Ashton *vs.* Wood, Hall *vs.* May, *ubi supra*; Hardwick *vs.* Mynd, 1 Anst., 109; Mattoon *vs.* Young, 45 N. Y., 696.)

It may be that the words "heirs or assigns," as used in a land-patent or deed of conveyance, would not pass the right of action for breach of a covenant *in presenti*. Congress would, nevertheless, have the right to name the parties to whom alone the excess purchase-money should be paid. The words "heirs or assigns," in a land-patent or

deed of conveyance, mean at common law, that the *grantee* takes the land absolutely; that on his death intestate the title goes to his heirs-at-law; that if he assigns or conveys the land it goes to the assignee, and carries with it every accessory and demand connected with or arising out of the property. The statute makes in the present case the right to a refund of the excess purchase-money, while remaining unsatisfied, a demand growing out of the land.

At common law the original purchaser of the land, or, in case of his death, his personal representatives, would alone have the right to collect the excess purchase-money from the Government. Neither the heirs, as such, nor the assignees of the land would have any claim on the Government therefor. Congress evidently intended to change the common-law rule on this subject, else the statute would not have been passed. Congress has, in section 2372 of the Revised Statutes, virtually affirmed, in similar cases, the common-law rule; but in the act of June 16, 1880, Congress employed language different from that of section 2372, and therefore evinced a purpose to depart from the rule of the common law in the case provided for.

The statute follows in some respects the analogy of the English statute, 32 Henry VIII, c. 34, which changed the *very old* common law "so far as to enable *assignees of reversions* of particular estates, to which conditions and covenants were annexed, to take advantage of the same." Kent says of this statute, that "the provision is so reasonable and just that it has doubtless been generally assumed *and adopted as a part of our American law.*" (4 Comm., 123.* See Dutton *vs.* Howell, Show. Parl. Cas., 31; Calvin's case, 7 Coke's Reports, 34; Blankard *vs.* Galdy, 2 Salkeld, 411, 412; s. c., 4 Mod., 215, 222; Comb., 228; Holt, 341.)

The accounting officers of the Treasury can only recognize the statutory right of the assignee. If the assignor or first purchaser claim any equitable rights in the matter, the accounting officers are without

*This statute will be found in volume 1, page 200, of the third edition of "A collection of statutes connected with the general administration of the law, . . . with notes by Sir William Davis, Kt. London, 1829." It extends to "every person, their heirs, successors, or assigns, which have, or shall have, any gift or grant of our said sovereign lord, [the King.] by his letters patent, of any lands, tenements, hereditaments," &c.

It gives to the King's "*grantees of reversions*" "the same advantage, benefit, and remedies by action for not performing of condition, covenants, or agreements contained and expressed in the indentures . . . of their said devises or grants against all and every the said grantees and assigns *as the grantors themselves, their heirs or successors, . . . might have had and enjoyed.*" &c., &c.

In this volume is appended the exposition of the act by Sir Edward Coke, 1 Inst., 215.

This statute made certain rights of action assignable which were not so prior to its date.

jurisdiction to consider them. (Klink's case, 1 Lawrence, Compt. Dec., 247-9; 2 Kent, Com., 230; Milnor *vs.* Metz, 16 Pet., 225; Stow *vs.* U. S., 5 Ct. Cls., 371; Hartga *vs.* Bank of England, 3 Ves., jr., 55; Bank of England *vs.* Parsons, 5 Ves., 668; Franklin *vs.* Bank of England, 1 Russell, 575; U. S. *vs.* Gillis, 95 U. S., 412; Bonner *vs.* U. S., 9 Wall., 159; U. S. *vs.* Morris, 10 Wheat., 303; U. S. *vs.* Robeson, 9 Pet., 325.)

Section 2362 of the Revised Statutes authorizes the Secretary of the Interior, "upon proof being made, to his satisfaction, that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed, to repay to the purchaser, or to *his legal representatives* or assignees, the sum of money which was paid therefor." By this provision payment is, in case of the death of a purchaser who has not sold or assigned the land, to be made to the "*legal representatives*" of the deceased; and when the land has been assigned, the right to payment would vest in the assignee. The act of June 16, 1880, (21 Stats., 287, sec. 2,) requires the repayment of the excess purchase-money to be made to the person who made entry, "or to *his heirs* or assigns."

Provision for repayment of the purchase-money of lands erroneously sold was made as early as the act of January 12, 1825. (4 Stats., 80; Rev. Stats., 2362, 2363.)

The act of January 12, 1825, (4 Stats., 80,) provided that in case of lands erroneously sold by the United States, repayment should be made to the purchaser or his legal representative. This act was amended by the act of February 28, 1859, sec. 1, (11 Stats., 388) so as to authorize repayment, alternatively, to (1) the purchaser, (2) the legal representative of the purchaser, (3) the assignees of the purchaser. The intention to make repayments to the assignee of the land in case of the sale of the land by the original purchaser is plain; and it is also clear that in such case it is the holder of the land under the first assignment alone who is entitled to repayment under the act of 1859.

Although there was not prior to the passage of the act of June 16, 1880, any statutory provision for the repayment of excess purchase-money in cases precisely like the present one, yet the principle of repaying any excess in the payment of purchase-money was applied by Congress in its public-land legislation in 1855. The act of Congress of August 4, 1854, (10 Stats., 574,) reduced to actual settlers and cultivators the prices of the public land in proportion to the length of time it had been in the market. The act of March 3, 1855, (10 Stats., 649,) provided for a refund of the excess over the prices fixed by the reduction and graduation act of August 4, 1854.

In the absence of the statutory provision for repayment, a claimant of money paid for land in excess of the legal price might have sued the United States in the Court of Claims for its recovery. (Rev. Stats., 1059.) If an appropriation for refunding it had been made by Congress, the proper accounting officers could have stated an account for its payment, and a suit in the Court of Claims would have been unnecessary.

The right to a refund, whether asserted (1) in the Court of Claims, or (2), without the aid of the act of June 16, 1880, before the accounting officers of the Treasury Department, or (3), since that act, before such accounting officers, was in the original locator, and so would remain unless disposed of in pursuance of a statute. The act of June 16, 1880, could not divest him of this right. But when it provided, as it did in effect, that if such original locator shall *thereafter* sell his land, the right to a refund shall pass to his "assigns," his right was divested by *his own act* under and in pursuance of the statute. The statute entered into and became a part of his contract of sale.

If a locator of land entitled to a repayment of excess purchase-money had sold and conveyed his land prior to the act of June 16, 1880, his vendee would not be entitled to the refund. The rights of parties would have remained as at common law. To hold otherwise would give the statute a retroactive effect upon rights of claimants.

The original locator, Allspach, sold and conveyed the land now in question to William Little, on July 28, 1880—*after* the approval of the act of June 16, 1880.

The act transfers the claim to a refund of excess purchase-money to the heirs of the original locator upon his death, thereby showing that the claim until satisfied runs with the land. By analogy, and upon the maxim *Noscitur à sociis*, the right to a refund passes to the vendee of the land.

The claim now made is rejected.*

TREASURY DEPARTMENT,

First Comptroller's Office, May 16, 1881.

* The circular of August 6, 1880, of the Commissioner of the General Land Office, approved by the Secretary of the Interior, to registers and receivers, with instructions governing the repayment of purchase-money, fees, commissions, and *excesses*, under sections 2362 and 2363, United States Revised Statutes, recites the act of June 16, 1880.



**IN THE MATTER OF LIABILITY FOR THE EXPENSES OF
GOVERNMENT WITNESSES WHO ARE EMPLOYÉS, BUT
NOT "OFFICERS" OF THE UNITED STATES.—LANGFORD'S
CASE.**

1. When a clerk or other officer is a witness in court for the Government, away from his place of business, he is entitled to the payment by the Government of his "necessary expenses."
2. Such expenses *may* be paid by the proper United States marshal, as a disbursing officer, on a sworn itemized statement duly sanctioned by the proper court; but no court has jurisdiction to make, as to the amount of or liability for such expenses, an order conclusive in favor of the marshal against the proper accounting officers of the Treasury Department.
3. An examiner of national banks, appointed under section 5240 of the Revised Statutes, is not an *officer*. When he is a witness in court for the Government, he is to be paid as other *witnesses* for such service, and not as an *officer* entitled to reimbursement for necessary expenses.
4. If the court in which the bank examiner is a witness examines and certifies, by order in court, his *expenses* in that capacity as a witness, the marshal is not entitled to credit, in the settlement of his accounts as a disbursing officer, for a voucher showing payment of such "expenses."
5. The opinion of the Attorney-General of August 2, 1878, (16 Op., 113,) examined.
6. The First Auditor and the First Comptroller are authorized to settle and adjust the accounts of marshals, notwithstanding the supervisory authority of the Attorney-General over marshals.

The marshal of the United States for the Territory of Montana paid to N. P. Langford, an examiner of national banks, appointed, under section 5240 of the Revised Statutes, by the Comptroller of the Currency, the sum of \$478 for his "expenses" as a witness on behalf of the Government at the November term, 1879, of the third district court. The payment was made pursuant to an order of court, which was *made under section 855 of the Revised Statutes*. The question arises, whether the voucher for this payment ought to be credited in the adjustment of the marshal's account.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The following provisions of the Revised Statutes are material to the question under consideration:

"SEC. 846. The accounts of district attorneys, clerks, *marshals*, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department

for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts: *Provided*, That no accounts of *fees* or *costs* paid to any *witness* or juror, upon the *order of any judge* or commissioner, shall be so re-examined as to charge any *marshal* for an erroneous taxation of such *fees* or *costs*.

* * * * *

“WITNESSES’ FEES.

“SEC. 848. For each day’s attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. * * *

“SEC. 849. No officer of the United States courts, in any State or Territory, or in the District of Columbia, shall be entitled to witness fees for attending before any court or commissioner where he is officiating.

“SEC. 850. When any *clerk* or *other officer* of the United States is sent away from his *place of business* as a witness for the Government, *his necessary expenses, stated in items and sworn to, in going, returning, and attendance* on the court, *shall be audited and paid*; but no mileage, or other compensation *in addition to his salary*, shall in any case be allowed.”

“SEC. 855. In cases where the United States are parties, *the marshal* shall, *on the order of the court*, to be entered on its minutes, pay to the jurors and *witnesses* all *fees* to which they appear *by such order* to be entitled, which sum shall be allowed him at the Treasury in his accounts.”

“SEC. 5240. The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a *suitable person* or *persons* to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller * * *.”

This latter section originally provided that—

“Every person appointed to make such examination shall receive for his services at the rate of five dollars for each day by him employed in such examination, and two dollars for every twenty five miles he shall necessarily travel in the performance of his duty, which shall be paid by the association by him examined * * *.”

The act of February 19, 1875, (18 Stats., 329,) changed the *rate* of compensation, but the amount is to “be assessed by the Comptroller of the Currency upon, and paid by, the respective associations so examined.”

It is important to ascertain the extent of the *jurisdiction* of the district judge under these statutes. If he acted in a matter as to which the statute protects the marshal from a charge for “an erroneous taxation ”

of fees or costs, his order, though not warranted by the facts of the case, will entitle the marshal to credit for the amount paid pursuant to it; but it will not prevent the United States from reclaiming from a witness moneys paid which such witness ought not in law to have received. The order is so far *ex parte* that it is not *res adjudicata*, concluding the United States. This right to recover money wrongfully obtained is the necessary effect of section 846, which makes all accounts named therein "subject to revision upon their merits" by the accounting officers, "as in case of other public accounts."

Sections 846 and 855, in connection with the act of February 22, 1875, (18 Stats., 333,) gave jurisdiction to the proper court to make an order as to "fees or costs."

These have a technical statutory signification, consisting as they do of "*per diem* compensation," called also in the statute "*per diem* attendance fee," and of mileage, called also "travel fee," which latter may be covered by the comprehensive term "costs." A court cannot be required to exercise a jurisdiction which is *executive* and not *judicial* in character. (Hayburn's case, 2 Dall., 410; Wilkinson *vs.* Leland, 2 Pet., 657, 660; Sampeyreac and Stewart *vs.* United States, 7 Pet., 222; Kendall *vs.* United States, 12 Pet., 623; Fletcher *vs.* Peck, 6 Cranch, 136.) When a "clerk or other officer of the United States" is a witness, and away from his place of business as such officer, he is not entitled to any "*per diem* attendance fee." He is, under section 850, entitled, not to fees, but to his necessary expenses when *stated in items* and sworn to.

The case of such clerk or other officer is therefore entirely different from that of a witness for whose payment the court has authority to make an order which can protect the marshal from a charge for an erroneous taxation of *fees or costs*. The clerk or officer can have no claim for "*fees*" or "*costs*," and it is only as to *these* that the court can make *such* order. His necessary expenses are to be "*audited* and paid," as on an account "*stated in items and sworn to*."

The statute requires claims of this class to be adjusted by the proper accounting officers of the Treasury Department. (Rev. Stats., 850; see secs. 191, 236, 269, 277.)

The fact that the account of an officer for "necessary expenses" may, as hereafter shown, be paid without any action of the court, goes far to show that the words "*fees and costs*," as used in section 846, do not include such "necessary expenses;" and hence payments of the latter by the marshal are not within the proviso of that section so as to be exempt from *re-examination* by the accounting officers.

If a bank-examiner is an officer, his necessary expenses as a witness
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are, as a general rule, to be paid upon his rendering to the accounting officers an itemized account, duly sworn to, which, before making payment, is to be audited, in like manner as other accounts. In such case the bill of expenses need not be submitted for approval to the court. Such expenses may also be paid by the marshal as a disbursing officer, but the payment will be made subject to the authority of the proper accounting officers to *audit* and pass upon the correctness of the disbursement. Payments of extravagant or unnecessary expenses of witnesses would not be credited to the marshal. Advances may be made to the marshal for the payment of the expenses of officers attending court as witnesses. (Rev. Stats., 3648.)

The effect of the act of February 22, 1875, (18 Stats., 333,) was to take from the judge *at chambers* the power to make orders as to "fees or costs." Section 846 was virtually so amended as to require the orders to be made in open court.

An examiner of national banks is not an "*officer*" of the United States. The statute requires him to be "a suitable *person* * * * to make an examination of * * * [a] banking association;" but it does not require him to be an officer of the Government. In taking this view of the statute, no importance is attached to the fact that he is not paid by the Government. There *are* officers of the United States who are compensated by fees paid by those for whom they render service. (Rev. Stats., 828, 829, 847, 5008, 5124.) In the case of the United States *vs.* Hartwell, (6 Wall., 393,) it is said that an office "embraces the ideas of tenure, duration, emolument, and duties." This description is repeated in the case of the United States *vs.* Germaine, (99 U. S., 511,) in which it is decided that a civil surgeon appointed by the Commissioner of Pensions to make the periodical examination of pensioners is not an officer. The court says:

"The duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination."

This, *mutatis mutandis*, so well describes the temporary character of the employment of an examiner of national banks as to settle beyond all doubt that he is *not* an officer. (See Wood's case, 1 Lawrence, Compt. Dec., 8; Herndon's case, *Id.*, 49; Wade's case, *Id.*, 302; Bender's case, *Id.*, 323; Randolph's case, *ante*, 16; Collins *vs.* United States, 15 Ct. Cls., 22.)

At common law a public officer had duties to discharge incident to his office. These he performed in the name of the Crown and by virtue of his office. (Harcourt *vs.* Fox, 1 Shower, 524, 529, 532, 534, 535;

Show. Parl. Cas., 163; Holt, 189; 4 Mod., 168; 12 Mod., 42; Coke upon Litt., 42; Hob., 153; Owen *vs.* Saunders, 1 Lord Raym., 164; Dyer, 114 *b*, pl. 63; 1 Roll. Abr., 511, l. 8, 13.) When they were of a purely ministerial character, he could, in case of neglect, be compelled by mandamus to fulfil them; and, in some cases, he was liable to indictment for refusal or neglect to do so. (Leigh's case, 1 Munf., 475; In matter of Oaths of Attorneys and Counsellors, 20 Johns., 492.) This individual authority and responsibility, which is the most prominent characteristic of a ministerial officer, is totally absent from a Government clerkship or agency. The person who occupies such a position can, by virtue thereof, do no official act. He is merely the instrument by which a certain executive officer performs duties which the law requires such officer to perform. A mandamus, where it would lie, would, in respect of such duties, be issued to the officer, and not to the clerk or agent serving under him. By looking to the source of appointment as an aid in ascertaining whether a person in the service of the Government is an officer, the national courts have, in various classes of cases, enlarged the word office beyond its common-law limitation; but it is now too late to attempt any restriction of the word to its ancient signification. (*Vide Ex parte* Duncan N. Hennen, 13 Pet., 260.)

In an opinion of the Attorney-General of August 2, 1878, (16 Op., 113,) it is said of the word "officer," as used in section 850 of the Revised Statutes, that it "is to receive a liberal construction. It does not import an *officer* as distinguished from a *soldier*, but any person who is an *employé*, or is in the service, of the United States, in however humble a capacity."

This construction cannot be adopted. The section applies, in terms, to "any clerk or other officer." *Expressio unius est exclusio alterius*: If any employé or servant of the United States be neither a clerk nor an officer in the general acceptance or legal sense of the term "officer," he will not come within the provision of the statute.

There are manifest reasons why the expression "clerk or other officer" cannot include all persons in the service of the United States.

1. The words have a technical legal sense, and by a well-known rule of construction they are to be construed in that sense, "unless it appears that they were intended to be applied differently from their ordinary or legal acceptance." (Sedgwick on Statutory and Constitutional Law, 2d ed., 221.) An able law writer says, that "upon subjects relating to courts and legal process, we are to consider the legislature as speaking technically, unless from the *statute itself* it appears that they made use of the terms in a more popular sense." (*Id.*, 221,

224; 1 Kent, Com., 4th ed., 461; Clark *vs.* City of Utica, 18 Barb., 451; *Ex parte* Hall, 1 Pick., 261, 262; Merchants' Bank *vs.* Cook, 4 Pick., 405; Macy *vs.* Raymond, 9 Pick., 286; Snell *vs.* Bridgewater Cotton-Gin Mf'g Co., 24 Pick., 296; United States *vs.* Jones, 3 Wash. C. C., 209; The Fashion *vs.* Wards, 6 McL., 152; Apple *vs.* Apple, 1 Head, 352; McCool *vs.* Smith, 1 Black, 459; Gibbons *vs.* Ogden, 9 Wheat., 189; Ogden *vs.* Saunders, 12 Wheat., 332; Fairlee *vs.* Corinth, 9 Vt., 269.) See, as to the word "office," Doty *vs.* The State, 6 Blackf., 529; Seymour *vs.* Ellison, 2 Cow., 29, 30, *n.*; Dana *vs.* Gill, 5 J. J. Marsh., 243; In the matter of Oaths of Attorneys and Counsellors, 20 Johns., 493; Leigh's case, 1 Munf., 468.)

2. The *popular* sense of the term "officer" is generally, also, the technical legal sense. When, as in this case, the *popular* and the *legal* sense of the term unite, the conclusion that a national-bank examiner is not an officer acquires additional confirmation. There are many persons in the service of the United States who have never, in either the legal or popular sense, been denominated officers.

The large and useful class of persons, for example, who set type, run printing-presses, bind books, and render similar valuable services in the office of the Public Printer, have never been known in legal or popular parlance as "*officers*," yet they are in the service of the United States. (Act June 20, 1874, 18 Stats., 88.)

When one of these is in receipt of *per diem* compensation, and, in response to a subpoena, attends court at a place away from his employment, his pay stops as a consequence of such attendance.

If such employé be denied *per diem* as a witness, he will in effect be denied compensation for the time lost in attending court in behalf of the United States.

Did the statute contemplate such an injustice as this denial would form? Clearly not. There are thousands of persons in the service of the United States who labor on public buildings, and in various other employments: are such persons to be denied *per diem* compensation when attending court as witnesses on the part of the Government?

Can it be presumed, with any appearance of reason, that Congress intended to prohibit all compensation for the losses sustained by them in rendering obedience to the process of the National courts, while all who are "officers" would, during the like attendance, be entitled to undiminished salary? Most assuredly Congress intended no such invidious discrimination.

3. The statute furnishes internal evidence that it applies only to such persons as are properly denominated officers.

a. It applies in terms to "any clerk or other officer * * * sent away from his place of business," and declares that he shall be paid "necessary expenses," but "no mileage or other compensation in addition to his *salary*." The term "*salary*," though in popular use often applied to the compensation of persons in a service of a permanent character, is in the legal sense the compensation of an *officer*.

The sum paid by the Government for work done or service rendered by persons who are not officers is, in legal and popular sense, variously called wages, compensation, per diem, charges, commissions, pay, allowances, &c., as the case may be. (Rev. Stats., 1261, 1764; see secs. 1893, 1894, 3158, 3624, 3689, (p. 725,) 4203, 4204, 4647, 4648, 5099, 5100.)

b. Sections 849 and 850 provide for the case of officers of the United States courts, clerks, or other officers. This is the only designation given of those who are excluded from the right to receive the fees of witnesses. The rule of construction under which the meaning of words is ascertained upon the maxim, *Noscitur à sociis*, forbids any such extension of the provision of these sections as would include those who are not officers. (Broom's Leg. Max., 588; Sedgwick, Stat. and Const. L., 360, *n*.) Not one word is used to designate persons who are not, in the legal sense of the word, officers. When those persons in the service of the Government who are not officers are, including all classes of them, so numerous as vastly to exceed in number those who *are* officers, it is incredible that Congress meant, by a word which has no legal or general application to them, that they should be included in the lesser and higher class of public servants whom, in accordance with the legal and popular sense alike of the term, it designates as officers. To sustain the imputation of such a purpose, it would be necessary to show that Congress is either unduly economical in the use of words, or totally ignorant of their scope and import. Either proposition is incapable of proof, and at war with all experience and reason:

"The legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context." (*Lessee of Levy vs. McCartee*, 6 Pet., 110.)

c. In acts of Congress having relation to officers and other persons, apt words are employed when necessary to enlarge or limit the application of the statutory provisions. When Congress intended to deny duplicate compensation to persons in the service of the United States, it used the words: "No *officer* in any branch of the public service, or any *other person* whose *salary*, *pay*, or *emoluments* are fixed by law or regulations." (Rev. Stats., 1765.)

The following citations illustrate the use of apt words in legislation having relation to officers and other persons: "No money shall be paid

to any *person* for his compensation who is in arrears to the United States," (*Id.*, 1766;) "every *officer* or *agent* of the United States," (*Id.*, 5491;) "every *person*," (*Id.*, 5492;) "any *person* * * * charged with the safe-keeping," (*Id.*, 5495;) "every officer of the United States, or *person* holding any place of trust or profit," (*Id.*, 5498.) See also Rev. Stats., 2d ed., Appendix, pp. 1093, 1097; act August 15, 1876, 19 Stats., 169, sec. 6.

d. The plain meaning of the word officer cannot, by any proper rule of construction, be extended to *agents* and *employés* who fill no offices. Where general words follow particular ones the rule is, to construe them *ejusdem generis*. (*Sandiman vs. Breach*, 7 Barn. & C., 100; *Rex vs. Inhabitants of Whitnash*, *Id.*, 602; 1 Blackst. Comm., 88.)

To construe a statute which expressly enumerates officers, and names no class of persons who are not either legally or popularly denominated officers, as including by the term "officer" everybody "who is an employé, or is in the service, of the United States, in however humble a capacity," would be in effect to import into the statute words which Congress had not incorporated in it.

In *King vs. Burrell*, 12 Ad. & Ell., 468, Patterson, J., said: "Every day I see the necessity of not importing into statutes words which are not to be found there. Such a mode of interpretation only gives occasion to endless difficulties." The Supreme Court has approved this declaration, and added that "statutes must rest on the words used." (*L. L. & G. R. R. Co. vs. United States*, 92 U. S. 751; see *Cantwell vs. Owens*, 14 Md., 226.)

4. No supposed *policy* of the statute can require the word officer to be construed as including agents and other employés of inferior rank. The purview of a statute may be enlarged or restrained, as the intention of the legislature may require; it must not be so extended as to transgress the necessary limits of the language used. (*Sedgwick, Stat. and Const. L.*, 200, *n.*; *Maxwell vs. Collins*, 8 Ind., 38; *Broom's Leg. Max.*, 646.) What is called the policy of the Government with reference to any particular legislation, is too unstable a ground upon which to rest a decision in the interpretation of statutes. (*Hadden vs. The Collector*, 5 Wall., 111.) Deciding upon the policy of a statute, has been likened by a learned judge to the perilousness of "riding an unruly horse." The *intention* of Congress is to be gathered from the whole statute, and from existing conditions and other sources; but words used cannot be enlarged beyond their fair, usual meaning, unless there be something in the statute which shows a purpose so to enlarge them. In cases of doubt, the sound principle, *Ita lex scripta est*, should not be lost sight of. (*Broom's Leg.*

Max., 551, 553; *Allen vs. Cook*, 26 Barb., 380; *Elliott vs. Turner*, 2 Com. B., 446, 461; *Robertson vs. French*, 4 East, 136; *Hunter vs. Leathley*, 10 Barn. & C., 871.)

The *intention*, pursuant to public policy, of the statute prohibiting *officers* from receiving fees as witnesses, was to prevent the payment of double or additional compensation, to which, without the prohibition, they might be held to be entitled, namely: first, by salary as officers, and, secondly, by fees as witnesses; and the prohibition applies to the case of an officer who may be compensated solely by *fees* from the public. (Wilson's case, *ante*, 206.)

According to the view taken, the statute which authorizes payment of expenses to witnesses is to be limited in its application to the case of officers attending court as witnesses on the part of the United States. A temporary absence from the post of duty does not generally deprive an officer of the right to his *salary*. (Evans's case, *ante*, 8; Eveleth's case, *ante*, 20; Seward's case, *ante*, 58.) The rule is different in the case of agents and other employés in the public service; their compensation is generally subject to the control of some superior officer, and may be stopped during absence from their proper employment. (Bender's case, 1 Lawrence, Compt. Dec., 323; *Gratiot vs. U. S.*, 15 Pet., 371; *U. S. vs. Macdaniel*, 7 Pet., 1; *U. S. vs. Ripley*, *Id.*, 18; *U. S. vs. Fillebrown*, *Id.*, 28; Evans's case, *ante*, 1; Eveleth's case, *ante*, 20.) Agents, so called, of the Government may in fact be officers; *e. g.*, special, local, and route agents of the postal service, (Tit. XLVI, Chap. 12, Rev. Stats. ;) but the appellation is not strictly accurate. A person acting under public authority as an examiner of national banks, who is entitled to no salary from the Government, and whose compensation is earned from banks examined by him, cannot while attending court as a witness be earning compensation which is to be paid by a national bank. When in such attendance no supposed *policy* of the statutes can exclude him from the right to the fees of a witness.

In this particular case, which may be illustrative of others, the allowance made to the bank-examiner for expenses as a witness is largely in excess of the amount to which he is entitled for *per diem* and *mileage*. If this claim be allowed by the accounting officers, they must, to be consistent, allow such expenses to every person, not an officer, in the employment of the Government who is subpoenaed as a witness in its behalf. There is but one safe rule, *i. e.*, to adhere to the words which Congress has used, and to give them their technical legal sense, which in this case is also the popular sense.

There is no elastic rule for interpreting the word "officer" as employed in the statute now under consideration. It must be confined to those

technically known as "officers," or else it must include *all persons* in the service of the Government. To begin to classify those who are in the service by any rules other than those which are well settled, would be to open the door for the exercise of *discretion*, which alone belongs to Congress. It is infinitely better to leave to Congress the work of correcting any defect in statutes than to invade legislative authority by adopting constructions against the plain meaning of words, and thus opening a field for the introduction of great abuses. (Sedgwick, Stat. and Const. L., 175, 183.)

Construction is only allowable when language is ambiguous. (Sedgwick, S. & C. L., 194; U. S. *vs.* Fisher, 2 Cranch, 358, 399; Case *vs.* Wildridge, 4 Ind., 54; Bosley *vs.* Mattingly, 14 B. Monroe, Ky., 90.) All beyond this is the domain of discretion, of arbitrary power, in which law ceases and despotism begins. It was well said by Burke, on the trial of Hastings, that "law and arbitrary power are at eternal enmity." Where discretion is substituted for law in the exercise of judicial power,

"———Chaos umpire sits,
And by decision more embroils the fray."

These dangers can be averted *only* by adhering, as far as practicable, to the words of the statute.

The Attorney-General has a supervisory power over marshals. (Rev. Stats., 362, 363, 369.)*

* Since the opinion of the Attorney-General of August 2, 1878, (16 Op., 113,) the following circular has been issued:

DEPARTMENT OF JUSTICE, *Washington, January 4, 1879.*

SIR: Inquiries lately made of the Attorney-General, by district attorneys and marshals from different districts, as to whether section 850 of the Revised Statutes is applicable to certain classes of officers subpoenaed as witnesses for the Government, suggest the advisability of issuing general instructions covering the subject of these inquiries.

You are accordingly informed—

1. That section 850, as construed by this Department, is limited to *salaried* officers who are sent away from their places of business as witnesses for the Government. This construction, which is favored by the implication contained in the last clause of the section, derives additional support from a reference to the original provision in the act of February 26, 1853, ch. 80. Officers compensated by *fees*, who are thus called away as witnesses, are accordingly not deemed to be within that section. These officers (except where the allowance of witnesses' fees to any of them is elsewhere prohibited, as in section 849) should be paid the per diem and mileage provided by section 848.

2. That section 850 is regarded by this Department as not extending to officers or employes of the Government for whose necessary expenses while travelling to and from court, and also during their attendance thereon, provision is otherwise made by Congress. Within this category, it is believed, come the special agents of the Post-Office Department, the special agents of the Pension Office, the special agents of the Treasury Department, Internal-Revenue agents, and Secret-Service operatives under the control of the Treasury Department—especially when called as witnesses for the Government in those cases wherein they are employed by direction of their respective bureaus or departments. These agents and operatives (in addition to

But, notwithstanding this supervision, the accounts of marshals are subject to the jurisdiction of the First Auditor and First Comptroller. (Rev. Stats., 191, 236, 269, 277, 369.)

When the allowance authorized to be made by a particular officer is intended to be *conclusive*, it is so specially declared in the statute. (Rev. Stats., 47, 48, 4646, 4648; Eveleth's case, *ante*, 25; Seward's case, *ante*, 58; Special-Session case, *ante*, 83; Campbell's case, *ante*, 239; Bender's case, 1 Lawrence, Compt. Dec., 335; Act March 3, 1849, sec. 6; 9 Stats., 414.)

As the national-bank examiner, whose voucher is now under consideration, was not an officer in the service of the United States, and received no *fees* or *compensation* from the Government during the time of his attendance at court as a witness, he stands on the same footing as any other witness on the part of the United States who is not an officer; he is entitled only to the statutory witness-fees.

The voucher is rejected, as not being evidence of a legal disbursement.

TREASURY DEPARTMENT,

First Comptroller's Office, May 17, 1881.

certain salaries or *per diem* paid them as compensation for their services) are understood to receive allowances for travelling and other incidental expenses, incurred while in the discharge of their duties, out of appropriations specially provided for these objects. Section 850 does not comprehend expenses for which Congress has thus specially provided.

District attorneys and marshals are instructed, in dealing with claims of witnesses under section 850, to act in conformity hereto. They are directed, before allowing or paying under that section any officer or employé of the United States who has been subpoenaed as a witness for the Government his necessary expenses for travel and attendance on court, to require from the claimant a declaration, to be inserted in and made part of the affidavit to his account, that he has not received, and is not entitled by the regulations of the bureau or department in whose service he is or was employed to claim or receive, and will not claim, from such bureau or department, any allowance whatever for those expenses.

Very respectfully,

CHAS. DEVENS,
Attorney-General.

IN THE MATTER OF REIMBURSING INTERNAL-REVENUE COLLECTOR THE AMOUNT OF JUDGMENT RECOVERED AGAINST HIM IN STATE COURT, IN A SUIT OF WHICH THE UNITED STATES DISTRICT ATTORNEY HAD NO KNOWLEDGE OR NOTICE.—RAMSEY'S CASE.

1. It is the duty of the attorney of the United States to appear in behalf of collectors and other revenue officers of the United States in all suits pending in his district, both in *State* courts and in courts of the United States, when such attorney has knowledge or notice of the pendency of such suits.
2. A revenue officer against whom judgment has been rendered in a *State* court for an official act is not entitled to be reimbursed by the United States for money paid on such judgment unless the proper district attorney was duly notified, or had knowledge of the pendency of the suit.

In May, 1868, S. B. Spurlock brought suit in the *State* circuit court of Davidson County, Tennessee, against Joseph Ramsey, to recover the value of three barrels of brandy, seized by the latter as collector of internal revenue in the fourth district of that State, because of not being stamped tax-paid; and in May, 1871, recovered judgment for \$558.20 damages and costs. Execution was issued, and \$355 made, November 24, 1871, by sale of Ramsey's property. Ramsey presented, October 14, 1880, a claim for reimbursement to the Commissioner of Internal Revenue, who, February 28, 1881, allowed \$355; which allowance was, March 1, 1881, approved by the Secretary of the Treasury. On this allowance, so approved, the Fifth Auditor stated, March 7, an account; on which the question arises, whether the amount thus allowed shall be certified by the First Comptroller as due to the claimant. (Rev. Stats., 269.)

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

Section 771 of the Revised Statutes makes it the duty of every "district attorney * * * to appear in behalf of the defendants in *all suits or proceedings* pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury."

The language of this section is sufficiently broad to include suits in State courts as well as those in courts of the United States. *Generalia verba sunt generaliter intelligenda*. There is nothing in the statute to

restrain or qualify the force of the comprehensive words employed. The purpose and policy of the law require this construction. The necessity for the presence of the district attorney is presumably greater in a State court than in a court of the United States. It cannot be reasonably supposed that Congress intended, while legislating on the subject, to omit providing for that which is most needed.

No State court could refuse the United States district attorney permission to appear for the purpose of making the defence contemplated in the law which binds him. (*Florida vs. Georgia*, 17 How., 491.) The power of Congress to protect the interests and rights of the United States is supreme.

It is unnecessary to consider the question whether this claim, to be valid, should have been presented in proper time. (Rev. Stats., 3228.) Nor is it material to consider whether a certificate of probable cause is also essential to its validity. (Rev. Stats., 3220; *Dunnegan's case*, *ante*, 92-98.)

The claimant is not entitled to be reimbursed, because it does not appear that the attorney of the United States for the district in which the seizure was made had knowledge or notice of the pendency of the suit, or that the Secretary of the Treasury had instructed the attorney not to defend the claimant. The principles laid down in *Dunnegan's case*, *ante*, 92, are equally applicable to the present case, and must be held to govern it.

The claim is rejected.

TREASURY DEPARTMENT,

First Comptroller's Office, May 18, 1881.

IN THE MATTER OF REQUIRING RELINQUISHMENT OF CLAIMS TO PUBLIC LANDS, WHEN ENTRIES THEREOF ARE CANCELLED, BEFORE MAKING REPAYMENT OF FEES, PURCHASE-MONEY, &c.—RELINQUISHMENT CASE.

1. The act of June 16, 1880, (21 Stats., 237,) requires a relinquishment of all claims to "homestead," "timber-culture," and "cash entries" of lands by parties asking a repayment of fees, commissions, excesses, or purchase-money in cases of cancellation for conflict, or where entries have been otherwise erroneously allowed.
2. The Secretary of the Interior cannot actually repay such fees, commissions, excesses, or purchase-money from the Treasury. He is authorized to approve claims for repayment, after which approval they are still to be examined on their merits, audited, and paid in like manner as other claims.
3. Vouchers for repayments will not be approved by the First Comptroller, unless the evidence of relinquishment which is required by the statute shall be filed with the claims.

The act of Congress June 16, 1880, (21 Stats., 287,) provides that—

"SEC. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns,* the fees and commissions, amount of purchase-money, and excesses paid upon the same upon the surrender of the duplicate receipt *and the execution of a proper relinquishment of all claims to said land*, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns."

In the settlement of accounts examined and audited by the Commissioner of the General Land Office under this section, the question has arisen whether a properly-executed relinquishment should be required from the claimants of repayments in all cases wherein the entries referred to in said section have been or shall be cancelled for conflict, or have been erroneously allowed and cannot be confirmed.

—

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

When a homestead, timber-culture, desert-land, or cash entry of public land has been made at a land office, and has been duly cancelled by the Commissioner of the General Land Office, for conflict, or where, from any cause, any of such entries has been erroneously allowed, and cannot be confirmed, the party who made the entry is, or his heirs or assigns are, entitled to a repayment of the fees and commissions, amount of purchase-money, and excesses paid upon the same, upon the surrender of the duplicate receipt *and the execution of a proper relinquishment of all claims to said land* so entered. The execution of such relinquishment is clearly required by the statute as a condition precedent to the repayment. It has been suggested that in *cash entries* no relinquishment is necessary, for the reason that the party making the entry acquired no title which he can relinquish. But it is clear that his entry gives color of title, and that possession thereunder is a *quasi* legal title. (Hobbs *vs.* Smith, 15 Ohio St., 419; James *vs.* Johnson & Morey, 6 Johns. Ch., 417.) Such entry may, by long possession, ripen into a perfect title

* As to the effect of the words "heirs or assigns," see Allspach's case, *ante*, 260; Peck *vs.* Ingraham, 28 Miss., 246; sec. 9 of the act of Congress of June 8, 1872, (17 Stats., 332.)

against the holder of an adverse patent. The entry gives a right to contest a cancellation before the register and receiver, the Commissioner of the General Land Office, and the Secretary of the Interior, when an entry of the same land has been made by another party. Possession under the first entry gives also a colorable right to defend an occupancy against a party claiming under a patent issued subsequently to such entry. The cancellation by the Commissioner of the General Land Office is an act committed by law to his judgment, and his decision as to the fact of cancellation is conclusive on the accounting officers. (Seward's case, *ante*, 63; *Fletcher vs. Peck*, 6 Cranch, 133.) But it is not conclusive on the party who made the entry. He may contest the validity of a patent for the same land issued on any subsequent entry to another party. A party in possession can defend against an action to recover by the holder of a void patent. A patent issued without authority of law is void. A patent issued for lands not authorized to be sold, or which are reserved from sale, is not voidable, but void. (*Holden vs. Joy*, 17 Wall., 211; *L. L. and G. R. R. Co. vs. U. S.*, 92 U. S., 733; 1 Op. Att.-Gen., 420; 2 Op., 186; 5 Op., 9; *Stoddard vs. Chambers*, 2 How., 284; *Kissell vs. St. Louis Public Schools*, 18 How., 19; *Easton vs. Salisbury*, 21 How., 431; *Minter vs. Crommelin*, 18 How., 87; s. c., 9 Ala., 594; *Brown vs. Clements*, 3 How., 650; *U. S. vs. Stone*, 2 Wall., 525; *Wilcox vs. Jackson*, 13 Pet., 498; *Reichart vs. Felps*, 6 Wall., 160; *State of Indiana vs. Miller*, 3 McLean, 151; *Hunter vs. Hemphill*, 6 Mo., 106; *Jackson vs. Lawton*, 10 Johns., 26; *Railroad Co. vs. Smith*, 9 Wall, 96; *Doe vs. Files*, 3 Ala., 47; *Doe vs. Watts*, 7 S. & M., 363; *Perry vs. O'Haulon*, 11 Mo., 585; *People vs. Livingston*, 8 Barb., Sup. Ct., 253; *Wright vs. Rutgers*, 14 Mo., 585; *Garton vs. Cannada*, 39 Mo., 357; *Lindsey vs. Hawes*, 2 Black, 554; *State of Minnesota vs. Bachelder*, 5 Minn., 223; s. c., 1 Wall., 109; *O'Brien vs. Perry*, 1 Black, 132; *Clements vs. Warner*, 24 How., 394; *Garland vs. Wynn*, 20 How., 6; *Barnard vs. Ashley*, 18 How., 43; *Gingrich vs. Foltz*, 19 Pa. St., 38; *Hale vs. Gaines*, 22 How., 144; Report of Commissioner General Land Office for 1868, p. 126; *Polk vs. Wendell*, 9 Cranch, 87; s. c., 5 Wheat., 301; *Shepley vs. Cowan*, 91 U. S., 330; *Johnson vs. Towsley*, 13 Wall., 72; *Marquez vs. Frisbie*, 101 U. S., 473.)

This principle is recognized by Congress in the acts providing for the return of purchase money in case of unauthorized sales. (Acts March 3, 1819; May 21, 1824; January 12, 1825; May 24, 1828; 1 Lester, 34, 36, 38, 40, 667; *Branson vs. Wirth*, 17 Wall., 32; s. c., *Wirth vs. Branson*, 98 U. S., 118; *Moore vs. Robbins*, 96 U. S., 530.)

The statute provides that, after the cancellation of an entry, "the

Secretary of the Interior shall *cause to be repaid*" to the person who made such entry, or to his heirs or assigns, the fees, commissions, purchase-money, and excess paid. This provision can only mean that the claim for repayment is to be approved by the Secretary of the Interior. He does not literally repay. The claim is, under section 456 of the Revised Statutes, to be audited and stated by the Commissioner of the General Land Office; and then the First Comptroller is required to re-examine the same, and either to certify for payment the balance which he finds due, or, if he find no balance due, to reject the claim altogether. (Rev. Stats., 269; Allspach's case, *ante*, 260.)

Vouchers for repayments will not be approved in this office unless the evidence of relinquishment which is required by the statute shall be filed with the claims.

TREASURY DEPARTMENT,

First Comptroller's Office, June 3, 1881.

IN THE MATTER OF THE FEES OF UNITED STATES MARSHALS, CLERKS OF THE CIRCUIT AND DISTRICT COURTS, AND COMMISSIONERS OF THE CIRCUIT COURTS FOR ISSUE AND SERVICE OF SUBPENAS.—SUBPENA CASE.

1. The act of February 22, 1875, (18 Stats., 334, sec. 7,) was designed to prohibit *constructive* mileage: as, *e. g.*, when a writ is transmitted to be served by a deputy marshal residing or stationed at or near the place of service, mileage is not to be allowed except for actual and necessary travel.
2. Giving the act that construction which denies compensation for "travel not * * * necessarily performed," as its language and evident purpose require, no more mileage can in such case be paid than that for which a deputy nearest the place of service might properly charge for actual travel from the place where he receives the writ to the place of service.
3. Section 877 of the Revised Statutes provides that witnesses who are required to attend any term of a circuit or district court *on the part of the United States*, shall be subpoenaed to attend *to testify generally on their behalf*; and that under such process they "*shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.*"
4. The clerk of the court is not at liberty to elect between this statutory form of subpoena and the form which issues as in a cause pending in court. Section 877 is to be construed as commanding the clerk, when witnesses on behalf of the United States who reside in the same locality or direction of travel from the court are required to attend at any term thereof, to issue for them one general subpoena, whether their testimony be needed before the grand jury or in a cause or causes to be tried either by the court or jury.

5. The opinion of the late Attorney-General (16 Op., 169-70) that a marshal is entitled to "full mileage on *each writ* served by him, when several issued in behalf of the Government, to be served on *different persons*, are or might be served at the same time, only one travel being necessary to make the service on all of said persons, where such travel is actually performed;" and (*Id.*, 167) that, "in regard to mileage, section 829 *makes no distinction* between process issued in behalf of the Government and that issued in behalf of individuals," not concurred in, and not conclusive on the First Comptroller, who is required to *decide* questions of this character.
6. Section 829 of the Revised Statutes provides that "to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses *in a cause* in such subpœna as convenience in serving the same will permit." This provision applies to all subpœnas for witnesses, and is designed to secure economy and to restrict charges for fees in issuing and serving the writs, whether issued on behalf of the United States or of private suitors.
7. The provision as to "unnecessary expense" relates as well to the marshal's mileage as to the clerk's fees for issuing two subpœnas when one would accomplish the same purpose. Congress intended to protect suitors in court from all unnecessary expense in the service of process.
8. The marshal is entitled to but *one* mileage for all Government witnesses served in one locality or direction at the same time, no matter how many writs of subpœna he may have or what may be their form. An unlawful, because unnecessary, issue of two writs to accomplish the purpose of one, can give neither the clerk nor the marshal a right to increased fees. An unlawful act can give the clerk no right to increased fees, *if to any. Ex turpi causâ non oritur actio.*
9. The provision of section 823 of the Revised Statutes concerning the *taxation and allowance* of compensation to the officers and persons enumerated therein is to be construed with reference to the other sections and provisions relating to the subject; and it does not authorize the taxation and adjudgment of costs against the United States. In taxing and allowing such compensation, the court acts as a commission, on principles fully considered in the judicial expositions appended to Hayburn's case, 2 Dallas, 410, *et seq. Ex totâ materiâ emergat resolutio.*
10. The action of the court in certifying compensation to and approving the accounts of the marshals, clerks, and other officers mentioned in section 823 does not, as by a judicial decision, conclude the executive department of the Government from exercising a revisory power over the accounts, except in the case of fees or costs paid to witnesses or jurors upon the order of the circuit or district judge, or commissioner of the circuit court.

Mr. George Turner was marshal of the middle and southern districts of Alabama from April, 1876, to April, 1880. In the settlement of his accounts two questions arise: (1) Whether he is entitled to mileage on *each of two* or more writs of subpœna issued in *one* cause in court for witnesses on behalf of the United States, residing in one locality or in the same direction, and served at the same time; and (2) whether, in similar circumstances as to time and locality, he is entitled to mileage on each of two writs of subpœnas for witnesses required to appear and testify *generally* on behalf of the United States.

Mr. Turner, *pro se*, made an argument and presented a brief, claiming (1) that "where subpoenas on the part of the United States for witnesses to appear in *specific cases*, or to appear and testify *generally*, were served at the same time and in the same locality," the marshal is entitled to mileage on *each* writ served, (Revised Statutes, 829;) and (2) that the marshal has no control over the clerk; and if the latter do not include in one subpoena all the names of witnesses in one locality, the statute gives the right to mileage on each writ. The marshal must execute each writ. (Rev. Stats., 782; 3 Op., 497, 536.)

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The Revised Statutes provide as to fees of marshals:

"SEC. 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

* * * * *

"SEC. 829. For *service* of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons or subpoena for a witness, two dollars for each person on whom service is made. * * *

"For *travel, in going only, to serve any process*, warrant, attachment, or other writ, *including writs of subpoena* in civil or criminal cases, *six cents a mile*, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. But *when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time*, the marshal shall be entitled to compensation for travel on *only two of such writs*; and to *save unnecessary expense*, it shall be the duty of the clerk to *insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit*. * * *"

Section 877 provides that—

"Witnesses who are required to attend any term of a circuit or district court on the part of the United States, *shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.*"

The act of February 22, 1875, (18 Stats., 334, sec. 7,) provides that—

"* * * after the first day of January, eighteen hundred and seventy-five, no such officer [marshal, attorney, or clerk] or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law."

The question for decision as to mileage arises on three classes of subpœnas: (1) Those for witnesses in a cause in court; (2) those for witnesses to appear and testify before the grand jury; and (3) those for witnesses to testify generally.

It seems that in each of these three classes two or more subpœnas, to be served at the same time, were, in some instances, issued for witnesses residing in the same locality or direction from the place of the return of process. More than one subpœna for such witnesses were sometimes issued at the same time in one cause.

It will be convenient first to consider the act of February 22, 1875. It does not affect the questions to be decided, except as evidence of the purpose of Congress, in its general legislation, to dispense with all unnecessary or unreasonable costs and fees. This statute was designed to prohibit *constructive* mileage: as, *e. g.*, when a writ is transmitted to be served by a deputy marshal residing or stationed at or near the place of service, mileage is not to be allowed except for actual and necessary travel. This view is supported by the opinion of the Attorney-General of October 10, 1878. (16 Op., 169.) Whether the statute was also intended to prohibit mileage in cases where writs might, *without detriment to the public service or the rights of any party*, be sent by mail or express to a deputy for service, instead of his actually travelling with it from the office at which it was issued, is an important question. Giving the act that construction which denies compensation for "travel not * * * necessarily performed," as its language and evident purpose require, it may reasonably be held that no more mileage can in such case be paid than that for which a deputy nearest the place of service might properly charge for actual travel from the place where he receives the writ to the place of service.

The Acting Attorney-General, in an opinion of May 29, 1876, (15 Op., 108,) held that by force of this act—

"There can be but *one* charge for mileage for several writs (subpœnas, &c.) in hand at the same time, requiring the marshal to travel to the same place or in the same direction."

The later opinion of the Attorney-General (16 Op., 169) holds, and correctly as to this, that the act of 1875—

"Produces no modification of the provisions of section 829 [Revised Statutes] in so far as they fix the rate, determine the mode of computation, and limit the compensation of the marshal for the service of process."

Leaving out of view, then, the act of 1875 as in no way affecting the questions now to be decided, there are two sections of the Revised Statutes—829 and 877—which bear directly upon them.

There are three classes of subpœnas for witnesses: (1) Those which are issued in a *cause* in court, which describe the parties therein; (2) those which are general—i. e., describe no cause, and require witnesses "to attend to testify generally" on behalf of the United States; and (3) those which require witnesses to attend to testify before the grand jury.

Writs of the first class are in the form sanctioned by long usage, and as recognized at common law. The same may be said of the third class, now no longer necessary; since section 877 provides that witnesses who are required to attend any term of a circuit or district court *on the part of the United States, shall be subpœnaed to attend to testify generally on their behalf*; and that under such process they "*shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.*" This relates only to witnesses—all witnesses—required on behalf of the United States. They—all—"shall be subpœnaed to attend to testify generally." The clerk of the court is not at liberty to elect between this statutory form of subpœna and the form which issues as in a cause pending in court. Section 877 is to be construed as having a purpose not embraced in section 829. Where two statutes of the same date relate to the same thing, but one is more comprehensive than the other, "there will be an effort to give one of the acts some operation not embraced in the other, so that each may, if possible, have some effect; and that the legislature may not appear to have done a vain and useless thing." (*Naz. Lit. and Ben. Inst. vs. Commonwealth*, 14 B. Monroe, 266.)

Acts *in pari materiâ* are to be taken together, as if they were one law; and "if it can be gathered from a subsequent statute, *in pari materiâ*, what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." (*Cannon's Adm'r vs. Vaughan*, 12 Texas, 399, 402; 1 Kent, Comm., 12th ed., 463-4; *Huber vs. Reily*, 53 Pa. St., 119; *People vs. Utica Ins. Co.*, 15 Johns., 380; *United States vs. Collier*, 3 Blatch. C. C., 332-3; *The Sloop Elizabeth*, 1 Pa. C. C., 11; *Homer vs. The Collector*, 1 Wall., 486; *Reiche vs. Smythe*, 13 Wall., 165; *United States vs. Freeman*, 3 How., 564, 565; *Movius vs. Arthur*, 95 U. S., 146; *Arthur vs. Lahey*, 96 U. S., 113; *Dwarris on Statutes*, 569, Lond. ed. 1848; *Sedgwick on Statutory and Const. Law*, 2d ed., 207; *The King vs. Commissioners of Excise*, 2 Term Rep., 387; *The King vs. Mason, Id.*, 586; *The King vs. Saintsbury*, 4 Term R., 450; *Ex parte Drydon*, 5 Term R., 419; *The King vs. Inhabitants of Bowness*, 4 Maule & S., 212, 213; *Morris vs. Mellin*, 6 Barn. & C., 455; *Rex vs. Loxdale*, 1 Burr., 147; *Doug.*, 27, 30.)

Section 877 requires witnesses subpœnaed to testify generally, when called upon to do so by the court or district attorney, to "appear before the grand or petit jury, or both." In mere words—the naked letter—this would not include witnesses required to testify in causes to be tried without the intervention of a jury. But the evident *purpose* of a statute is to have effect even beyond or against the mere letter. (Holiday case, 1 Lawrence, Compt. Dec., 31; *Silver vs. Ladd*, 7 Wall., 226.) *Qui hæret in litera hæret in cortice*. Words in a statute apparently *restrictive* may be construed as general, or inclusive of all cases within its spirit, when such construction is necessary in order to carry out the intention of the law-making power. This is simply the converse of the rule that "general words may be aptly restrained according to the subject-matter or persons to which they relate." (Broom, Leg. Max., 7th ed., 646.) In construing a statute, it is proper to consider "the old law, the evil and the remedy." Here the evil to be remedied was the unnecessary multiplying of writs, where one might be made to answer the whole purpose. Were it not for the remedy provided, a separate subpœna might be issued for each witness in a cause, and also for each witness required to testify before the grand jury.

Section 877, then, is to be construed as commanding the clerk, when witnesses on behalf of the United States who reside in the same locality or direction of travel from the court are required to attend at any term thereof, to issue for them one general subpœna, whether their testimony be needed before the grand jury or in a cause or causes to be tried either by the court or jury.

I.—In order to determine how mileage on subpœnas is to be charged to the United States, it may be convenient to ascertain how private suitors are to be charged therefor, and then whether the Government is under the same or a different liability.

The late Attorney-General gave an opinion that a marshal is entitled to "full mileage on *each writ* served by him, when several issued in behalf of the Government, to be served on *different persons*, are or might be served at the same time, only one travel being necessary to make the service on all of said persons, where such travel is actually performed," (16 Op., 169–70;) and that "in regard to mileage, section 829 *makes no distinction* between process issued in behalf of the Government and that issued in behalf of individuals." (*Id.*, 167.) It will be seen hereafter that this opinion cannot be fully concurred in.

For private suitors section 829 makes three provisions. These will be separately considered :

(1.) "To save unnecessary expense, it shall be the duty of the clerk to insert the names of *as many witnesses* in a cause in such subpœna as *convenience in serving the same will permit.*"

"Convenience in serving" permits the names of all witnesses in one cause to be inserted in *one subpœna*, when they reside in one locality or neighborhood or in the same direction from the court, and are to be served in one course of travel and at the same time, or continuously. The number of writs of subpœna should not be unnecessarily increased. Certainly the statute requires that when all witnesses in one cause reside in one locality or in one direction from the court, and may be served at one time or continuously, their names should be included in one writ. If they reside in different directions, more than one subpœna *may* become necessary in order to enable different deputies to make service. The propriety of this economical provision may be perceived in the fact that without it the clerk might issue a separate writ for each witness.

(2.) "When more than two writs of any kind required to be served in behalf of the same party on the *same person* might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs."

A party may be plaintiff or defendant in two or three or a dozen different suits, each requiring the same witnesses. It would in such case be manifestly unjust to allow a marshal mileage on each of, *e. g.*, twelve writs when in fact only *one travel* was necessary in order to make the service. The section is not so carefully worded as it might be, but its purpose is plainly to prevent charges for mileage on each of a number of writs in the same cause requiring one travel only, and to limit the right to mileage in the case supposed to two writs, no matter how many writs in the different actions which can be served at the same time, or continuously in the same general course of travel, are issued.

The statute uses the words "two writs * * * served in behalf of the same party on the *same person* * * * at the same time." It may well be doubted, where there are more than two such writs of subpœna, whether more than two mileages can be lawfully charged merely because each writ may include some witnesses not named in the others. The statute uses the words "served * * * on the *same person.*" It applies to all writs, subpœnas included, and the words "same person" may have been used more especially with reference to writs other than subpœnas. The mere words of a statute yield to its evident purpose. To allow mileage on each subpœna issued in a dozen different causes in behalf of the same party would be in conflict with the *equity* and

purpose of the statute. This point, however, so far as private suitors are concerned, is a question for the courts, and not for executive officers.

(3.) "For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others."

It might be claimed, with some appearance of reason, that the *language* of this statute, in effect, gives six cents a mile, not on *each* subpœna, but, for serving "*writs* of subpœna." If the mere letter or words had been "for serving each writ," yet requiring the names of all the witnesses to be inserted in one subpœna, the *intention* to pay but *one* mileage would be so clear that effect must be given to it. The *intention* of Congress always controls the mere *words* of a statute.

The provision as to "unnecessary expense" relates as well to the marshal's mileage as to the clerk's fees for issuing two subpœnas when one would accomplish the *same* purpose. Congress evidently intended to protect suitors in court from all unnecessary expense in the service of process. An unlawful, because unnecessary, issue of two writs to accomplish the purpose of one, can give neither the clerk nor the marshal a right to increased fees. An unlawful act can give the clerk no right to increased fees, *if to any*. *Ex turpi causâ non oritur actio*. (Bensley *vs.* Bignold, 5 B. & Ald., 340, 341; Little *vs.* Poole, 9 Barn. & C., 199, 202; Law *vs.* Hodson, 11 East, 300; Shiffner *vs.* Gordon, 12 East, 304; Simpson *vs.* Bloss, 7 Taunt., 246; Marchant *vs.* Evans, 8 Taunt., 142; Wetherell *vs.* Jones, 3 B. & Ad., 221; Fivaz *vs.* Nicholls, 2 C. B., 501; Gaslight Co. *vs.* Turner, 7 Scott, 779; Holman *vs.* Johnson, Cowp., 343; Fletcher *vs.* Harcot, Hutton, 56; Allen *vs.* Rescous, 1 Lev., 174; Peck *vs.* Burr, 10 N. Y., 297; Belding *vs.* Pitkin, 2 Caines, 149; Gregg *vs.* Wyman, 4 Cush., 322; Springfield Bank *vs.* Merrick, 14 Mass., 322; Russell *vs.* De Grand, 15 Mass., 39; Wheeler *vs.* Russell, 17 Mass., 281; White *vs.* Franklin Bank, 22 Pick., 181.) The marshal is in no way damaged by the issue of two writs instead of one; his duties or labors are not increased, and, if they were, he can only take by the law what the law-makers intended that he shall have. A violation of, or non-compliance with, the law as to the number of, or form of issuing, writs of subpœna cannot give a right to additional fees when no additional service is required. If it could, the substance would be sacrificed to the shadow, and a powerful motive to defeat the will and express purpose of Congress would be furnished to officers of the Government.

II.—Having ascertained the rule as to the mileage chargeable to *private suitors*, that chargeable to the United States is now to be determined.

The learned and able Attorney-General has said, in the opinion cited, that “in regard to mileage, section 829 makes no distinction between process issued in behalf of the Government and that issued in behalf of individuals.” His *opinion* is always entitled to the highest respect, and it is persuasive, but of course it is not conclusive on the First Comptroller, who is required to *decide* questions of this character. It is not made so by section 362 or 368 of the Revised Statutes. In the opinion cited no reference is made to section 877 of the Revised Statutes. This section does, in effect, and when taken in connection with other provisions above cited, make a distinction as to mileage between the United States and private suitors. In plain words, and with a clear purpose, it, in effect, declares that *all* “witnesses who are required to attend any term of * * * court on the part of the United States, *shall be* subpoenaed to attend to testify *generally* * * * before the grand or petit jury, or both.” This requires that writs of subpoena, on behalf of the United States, shall not be issued as in a particular cause or causes, but for witnesses to testify for every purpose; or, if a cause or causes be mentioned, still the witnesses to testify generally. Here, then, is a “distinction” made between a private suitor and the United States in the matter of process.

If (to revert to the example above given) a private suitor have twelve cases in a court, and require one and the same person as a witness in each case, twelve writs of subpoena must issue, one in each case; and if the twelve writs be served at the same time and place, the marshal is, as already shown, entitled to *two mileages*. If, however, the United States have twelve suits, and require one and the same witness for each case, there should be, and lawfully can be, but one subpoena issued, because the statute requires him to be subpoenaed to testify generally before the grand or petit jury, or both; that is, in all cases and for all purposes for which the Government may require him. In such case, and for the service of such one subpoena, it is clear that only one mileage can be charged.

Here, then, is a clear distinction “in regard to mileage * * * between process issued in behalf of the Government and that issued in behalf of individuals.” The statute puts the United States in a better position as regards liability than an individual. In the cases supposed, the Government would *pay one mileage*, the individual *two mileages*.

The question of mileage will arise in other forms. The United States may have twelve actions pending, and may require twelve witnesses residing in one locality or direction of travel—a portion of them for one cause, a portion for another, and others for other causes. A private suitor may have the same number of suits, with witnesses similarly situated and required to testify in the same manner. Assuming that the twelve witnesses for the Government are to be subpœnaed on one writ, including the names of all witnesses, but that the private suitor *must* have twelve writs, one for each suit, each writ containing the names of a portion only of the twelve witnesses required for a particular case, then there must be again a distinction in regard to mileage between the Government and the individual. The Government will pay but one mileage; the private suitor must pay at least two, and it would seem, on the opinion of the Attorney-General, twelve mileages, since the latter says that a marshal is entitled to “full mileage on *each* writ served by him, when *several* * * *, to be served on *different persons*, are or might be served at the same time.”

It has been assumed that the names of the twelve witnesses for the Government are to be included in one subpœna; and this assumption is well founded in the laws. It is true that section 877 does not, in terms, require the names of all the witnesses to be included in one writ, in such case; but it would do violence to its spirit and purpose to omit any of them, and to issue separate writs; for this would be unnecessary, and hence by legal inference, if not in terms, unlawful; and therefore the clerk is not entitled to pay for such work.

This matter, however, is settled by section 829, which provides, in favor of the United States as well as of private suitors, that—

“To save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses *in a cause* in such subpœna as convenience in serving the same will permit.”

It is true that the statute employs the words “witnesses in a cause.” They are apparently restrictive; they apparently apply only to subpœnas in an action or proceeding *specifically named*. They really apply, however, to all subpœnas for witnesses. Several reasons may be given in support of this construction.

(1.) It is a rule of construction, as already shown, that words apparently *restrictive* may be regarded as *general* or *inclusive* of all cases, when it is necessary to carry out the *intention*, *reason*, or *spirit* of an act.

(2.) This provision of section 829, as shown by its words and its connection, is designed to secure economy and to restrict charges for fees in issuing and serving the writs. It is shown that it was intended

to do so for individual suitors. It is also shown that Congress intended to put the Government in even better condition in respect of such liabilities than private suitors. It is unreasonable, therefore, to hold that this provision applies only to witnesses "*in a cause.*" It applies to *all* witnesses, whether the writ is to be used "*in a cause*" or for their appearance before a grand jury, or for both purposes, or on a trial to the court.

(3.) Subpœnas on behalf of the Government are not to be issued as *in a cause*. Yet it is unreasonable to suppose that Congress did not intend that the Government should have the benefit of this provision. It is entitled to it by both the words and intent of the law.

The statute, then, requires the clerk in issuing a subpœna for witnesses on the part of the United States, whether generally or for the grand jury, as well as in subpœnas issued for private suitors in a cause, to include in one subpœna "the names of as many witnesses * * * as convenience in serving the same will permit." The Government and the private suitor were equally exposed to the mischief which the statute was designed to remedy.

It may happen that in the case of twelve separate actions the United States will require twelve witnesses, who reside in one locality, all to testify in each case; and a private suitor may be in the like condition. In such an event the private suitor will pay two mileages. What is the liability of the United States as to mileage in any possible contingency of this character? It has been already shown that in such contingency the clerk cannot on the part of the United States properly issue more than one subpœna, and that if he issue more he can be allowed pay for one only.

As there can be properly only one subpœna, there can be but one mileage; therefore, in this class of cases, the Government is in better condition as regards mileage-fees than the private suitor.

It is true that the clerk may disregard the statute, and, in all the classes of cases supposed, issue one subpœna for each cause, and as in the cause; and so he may, equally in disregard of law, issue more than one subpœna in one cause for witnesses residing in one locality and to be served with process at the same time.

Can the marshal lawfully claim mileage in such cases beyond that to which he would be entitled if the clerk had observed the spirit and purpose of the statute, and included in one general subpœna the names of all the witnesses? Clearly he cannot.

If the clerk should issue writs of subpœna for the Government as in *specific cases*, instead of issuing them generally, they would not be *void*,

though not issued as required by law. The statute is *directory*. The marshal is entitled to but *one* mileage for all Government witnesses served in one locality or direction at the same time, no matter how many writs of subpœna he may have or what may be their form. The statute requires the clerk to "insert the names of as many witnesses in a cause in such [one] subpœna as convenience in serving the same will permit," (Rev. Stats., 829, p. 157;) and it says that the purpose of this requirement is "to save unnecessary expense." (See, also, section 877.) It is clear that the intention of the statute is, that when the marshal travels in a given direction to serve witnesses for the Government with a subpœna, he shall have but one mileage.

A question may be raised as to the right of *executive* officers to review the action of the clerk of a circuit or district court in issuing several writs when one would be sufficient, and of the district judge in certifying the account of the clerk for such issue and of the marshal for fees and mileage on each writ. This right, on the part of the proper officers of the Treasury Department, clearly exists.

1. The Revised Statutes provide that—

"SEC. 846. The accounts of district attorneys, clerks, marshals, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. *They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts: Provided,* That no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs."

By the act of February 18, 1875, (18 Stats., 318,) section 846 is amended by adding thereto as follows: .

"Where the ministerial officers of the United States have or shall incur extraordinary expense in executing the laws thereof, the payment of which is not specifically provided for, the President of the United States is authorized to allow the payment thereof under the special taxation of the district or circuit court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary."

By the act of February 22, 1875, (18 Stats., 333,) it is provided:

"That before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and, in presence of the district attorney or his

sworn assistant, whose presence shall be noted on the record, *prove* in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, *that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money;* and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law, and just. United States commissioners shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid. Accounts and vouchers of clerks, marshals, and district attorneys shall be made in duplicate, to be marked respectively "original" and "duplicate." And it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the Treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all times. *Nothing contained in this act shall be deemed in anywise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force."*

Here, then, is express authority for the accounting officers of the Treasury to revise on their merits the accounts thus passed upon by the court.

2. It might be argued that the action of the court under these provisions is *judicial*; that any revision by executive officers is in the nature of an appeal, which can only be taken to higher judicial, but not to executive authority; and that to make such revision would be in violation of that principle of the independence of judicial and executive authority which has been established by the Constitution.

Assuredly an act of Congress cannot authorize an executive officer to modify the taxation of costs for which a court has rendered *judgment* in an action between private suitors; or even where the United States is a party, if the court be *authorized to render judgment therefor*. To do so would be an invasion of judicial authority. (Draft case, 1 Lawrence, Compt. Dec., 15.) Congress, however, may properly withhold from the courts the authority to render a judgment against the United States in any case; and it may give authority to render a judgment on the *merits* of a civil or criminal cause in which the United States may be a party, but withhold the power to *render a judgment for costs* against the United States. The latter is precisely the effect of existing statutes. There is no judicial authority to render a judgment against the United States for the fees now under consideration as costs. The court is authorized to certify that it is or is not satisfied that "the services charged have been actually and necessarily performed," and that "the disbursements charged have been fully paid;" whereupon it shall make

an "order approving or disapproving the account." In doing this the court acts not in its judicial capacity, but as in the exercise of a commission, on principles fully considered in the judicial expositions appended to Hayburn's case, 2 Dallas, 410, *et seq.*

The provision of section 823 concerning the *taxation and allowance* of compensation to the officers and persons enumerated therein is to be construed with reference to the other sections and provisions relating to the subject; and it does not authorize the taxation and adjudgment of costs against the United States. There is a rule of the Supreme Court that no costs shall be allowed against the United States. The laws which give the court a peculiar executive or administrative jurisdiction are to be considered as having a purpose other than and different from that of the provision in section 823 relative to private suitors. It is a rule of construction that the Government is not bound by a statute unless the contrary appear, either in express terms or by necessary implication. The language of this section and of the acts *in pari materiâ* therewith, coupled with the rule of court referred to, shows that the words "taxed and allowed" have, in their legal sense and effect, no such application to the Government as to create a liability against it. *Ex totâ materiâ emergat resolutio.* Consequently, the action of the court in certifying compensation to and approving the accounts of the marshals, clerks, and other officers mentioned in section 823 does not, as by a judicial decision, conclude the executive department of the Government from exercising a revisory power over their accounts, except in the case of fees or costs paid to witnesses or jurors upon the order of the circuit or district judge, or commissioner of the circuit court.

To sum up, then, the result of this inquiry into the principles which must be held to govern in the settlement of the accounts of marshals, clerks of the circuit and district courts, and commissioners of the circuit courts:

1. By force of section 877 of the Revised Statutes, subpœnas for witnesses to attend any term of a circuit or district court on the part of the United States, should require them "to attend to testify *generally* on behalf of the United States;" and under *such* subpœna they must appear before the grand or petit jury, or both, as the court or district attorney may direct.

2. Clerks of courts are, by necessary legal inference, required to insert in one writ of subpœna the names of all such witnesses when, at the

time of issuing it, these reside in one locality or in the same direction from the place where the writ is returnable.

3. If several subpoenas be issued at the same time for witnesses whose names should all be in one writ, the clerk will be allowed fee only for issuing one writ, and one mileage only will be allowed to the marshal for travel in serving them.

4. The act of February 22, 1875, does not change the rate or mode of computing mileage on writs served by marshals. It prohibits both constructive mileage on writs transmitted to and served by deputy marshals, and mileage for travel not necessarily performed.*

TREASURY DEPARTMENT,

First Comptroller's Office, June 24, 1881.

*August 19, 1881, E. E. Marvin, clerk of the United States District Court for the judicial district of Connecticut, addressed a letter to the First Comptroller, asking his opinion "as to the taxability of the travel and attendance of witnesses summoned in everybody's cause, or generally against any one of the accused who are arraigned at any particular term of the court."

To this the Comptroller replied:

"The matter should be submitted to the court * * *. I will, however, in compliance with your request, state my opinion: Nothing in the law indicates an intention to relieve defendants in United States cases from the payment of costs. It was not with that view that witnesses for the United States were required to be subpoenaed to attend to testify generally, but it was to save unnecessary expenses.

"In prosecutions for fines and forfeitures, under United States statutes, defendants are subject to costs; and on conviction for any other offence not capital, the court may award that the defendants shall pay the costs of the prosecution. (Rev. Stats., 974.) Amounts paid to witnesses are to be taxed and included in judgments against losing parties, in cases where by law costs are recoverable in favor of the prevailing party. (Rev. Stats., 983.)

"The fact that a witness is called and sworn as such in a criminal case on behalf of the United States is sufficient to authorize the taxation of his fees for attendance and travel in that case. And if he appeared before a commissioner, the grand jury, and the petit jury, the fees allowed him by the commissioner and the court should be included in the bill of costs payable by the defendant in case of conviction.

"If a witness testify in several criminal cases against several defendants, the court can apportion his fees among the convicted defendants, according to circumstances; but no one of the defendants should be charged with a larger sum than that for which he would be liable if the witness had testified against him only.

"The lawful fees of the marshal for serving subpoenas should be charged and taxed on the same principles.

"In districts where it has been the practice to subpoena witnesses generally for the United States, I have not heard of any difficulty in taxing costs.

"Very respectfully,

WM. LAWRENCE,
"Comptroller."

IN THE MATTER OF THE RIGHT TO MAKE SET-OFF ON
ACCOUNT OF DIRECT TAXES DUE FROM THE STATE OF
KANSAS IN SETTLING ACCOUNT WITH THE STATE
FOR PERCENTAGE OF PROCEEDS OF SALES OF PUBLIC
LANDS.—KANSAS CASE.

1. Under the Constitution, Congress cannot levy or enforce the collection of a tax or assessment on a corporate State which has not assumed the payment of it. The National Government does not operate upon States in the collection of revenues, but upon persons or property, or both.
2. But it is clearly competent for Congress, in the amplitude of its power, to authorize States to assume a proper proportion of any direct tax levied on the property in the United States subject to such tax, and then to withhold from such States as assume the tax, all moneys due them, respectively, until the debt is thus paid. For this the act of August 5, 1861, (12 Stats., 294,) made provision.
3. Section 191 of the Revised Statutes gives a finality to the decision of the First Comptroller as well in regard to claims certified in favor of, as to those against, the United States; since section 236, in express terms, authorizes accounts to be certified "in which the United States are concerned, either as debtors or as creditors."
4. When a claim against the United States has been rejected, it may in proper cases be opened for consideration by the direction or on the request of the Secretary of the Treasury. But when a balance is certified as due to the United States, the account on which it was certified cannot be reopened.
5. The power of the Secretary of the Treasury, under section 191, to submit to the Comptroller facts in his judgment affecting the correctness of a balance certified, cannot be exercised when no warrant for payment is required.
6. It is to be presumed that the decisions made by the Comptrollers are right; but whether so or not, they are none the less conclusive on their successors in office and upon the executive branch of the Government. Their adjudications are, however, not conclusive on Congress, nor in certain cases on the courts.
7. The right to set-off a debt due exists in favor of the United States, whether the debtor be a State or a person. This arises from the authority conferred on the accounting officers to adjust and settle accounts. The settlement of an account involves a statement of *debit* and credit, and the striking of a balance due, and no payment can be required beyond the amount due.
8. The civil-law doctrine of "account," or *compensation*, considered, and shown to be identical with that of set-off.
9. The statutes giving accounting officers jurisdiction, confer authority to make settlements and set-off, thus investing them with powers which always existed in courts of equity.
10. The usage has always been to make set-off in adjusting claims of creditors of the United States; and usage sufficiently continued, when not clearly against a statute, is law; it is evidence of what the law is. The right to make a set-off is fully supported by authority.

11. The making of set-off by the Government, in adjusting accounts, is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.
12. The act of March 3, 1875, chap. 149, (18 Stats., 481,) construed:
 - (1.) It is an enabling and perhaps an unnecessary act, for all purposes of a right to make a set-off.
 - (2.) It disables nothing. It is not negative in its terms, and hence repeals no usage founded on law previously existing.
 - (3.) It takes away no statutory or common-law right or remedy previously existing.
 - (4.) It is remedial, and by a well-known rule of construction is to be liberally construed.
 - (5.) Its terms apply alike to persons who can be sued and those who cannot.
 - (6.) It is not a repealing act. It leaves in force all the statutes giving jurisdiction to accounting officers, and finality to the adjudications of the Comptroller. It is to be read with these laws, and so construed as to take away none of their provisions.
 - (7.) It can only mean that when the right to make a set-off against a claimant is by him disputed, the Secretary must "cause legal proceedings to be immediately commenced" in those cases where such suits can be lawfully commenced.
 - (8.) It does not give a new jurisdiction to courts or require an impossibility.
 - (9.) A set-off can be made either (1) without its aid or (2) by virtue of its provisions.
13. Although a State may not be sued for its quota of the direct tax of 1861, it does not follow that the statutes do not authorize a set-off to be made against it by the United States.
14. If a claimant reside abroad, where he is not amenable to the process of our courts, the statutes give the right to make a set-off against him. The fact that the remedy given by the provisions of the act of March 3, 1875, cannot be pursued in every case, and in the mode prescribed, cannot, according to any fair rule of construction, be used to defeat entirely the right of set-off.
15. The act of August 5, 1861, sec. 53, (12 Stats., 311,) does not repeal any prior or other common-law or statutory right to make set-off. It is not negative in its terms. It recognizes the right of the United States to make a set-off against a State, and provides for a release by the State in order to end all controversy.
16. A "release," under section 53 of the act of August 5, 1861, "duly executed to the United States" by a State, is requisite in order to give the right to an abatement of 15 per cent. of the amount of direct tax assumed by such State. Such release is requisite as a waiver of any right which might be asserted by an appeal to Congress or the courts. (Rev. Stats., 191, 1059.)
17. As to claims allowed for war expenses paid by any State, and to be received as a credit on the direct tax, it was provided by the act of May 13, 1862, (12 Stats., 384,) that they should be filed before July 30, 1862. No limitation was made as to other claims.
18. The failure of a State to object to a decision of the Comptroller which was twice affirmed within a period of twelve years, is persuasive evidence that it was accepted by the proper State authorities.

19. The passage by a State legislature of an act "for the purpose of paying off" a tax due to the United States, which the State was authorized by act of Congress to assume and pay, is evidence of a debt due from the State; and conditions imposed in such act as to the mode of its liquidation are not binding upon the United States.
20. A State cannot be permitted to set up its own law or its adjudications against the United States, and then determine for itself the mode and measure of the latter's redress, without reference to the supreme law of the United States.
21. The Comptroller's predecessors seem to have held that an acknowledgment that a debt is due, is in itself an assumption of the debt; in other words, that when the legislature of a State admitted the special tax to be due from the State to the United States, the State did thereby "assume" its quota of the tax within the meaning of the act of August 5, 1861. In so holding they were fortified by strong authorities in law.
22. If a common-law action of assumpsit be brought upon an *insimul compulsent* for money due, or, as it is sometimes said, "upon an account stated," proof that a fixed and certain sum was admitted to be due supports the action, and so proves that the defendant, in legal parlance, "assumed" the payment of the liability. (2 Greenleaf, Evidence, secs. 126, 127.)
23. A debtor is not at liberty to pay a debt in such mode as he may choose, much less not to pay at all. The law prescribes the mode, namely, by legal tender of money, or by a set-off, and requires the payment to be made.
24. If any question be made as to whether a State assumed within the proper time its quota of the direct tax apportioned by the act of 1861, it may be said that when the United States is making no objection on that account, the State cannot, after its admission of indebtedness, and in view of the right of set-off shown to exist, require the objection to be made.
25. There is now no authority except in Congress or the courts to inquire whether the adjudications of the accounting officers of the Treasury Department in respect of the liability of a State for the direct tax, and the right of set-off on the part of the United States, were made in accordance with law.
26. The United States has never held itself liable to pay the debts of its territorial governments.
27. If the United States had been indebted to a State, the liability could not by law be adjudged by the authority of that State alone. The laws of the United States determine how the claims of a State are to be adjusted and paid.
28. The question as to the effect of the alleged "compact" between the United States and the State of Kansas proposed by the ordinance of July 29, 1859, in respect of the proceeds of sales of public lands, considered:
 - (1.) The ordinance proposed "that five per centum of the proceeds of public lands in Kansas as disposed of after the admission of the State into the Union shall be paid to the State for a fund, the income of which shall be used for the support of common schools."
 - (2.) The State constitution itself contains this provision: "Such per cent. as may be granted by Congress on the sale of lands in this State shall be the common property of the State, and shall be a perpetual school fund, which shall not be diminished, but the interest of which, together with all the rents of the lands, and such other means as the legislature may provide, by tax or otherwise, shall be inviolably appropriated to the support of the common schools." (Art. VI, sec. 3.)

- (3.) Congress, in passing the act of January 29, 1861, admitting the State into the Union, did not agree to this proposition of the ordinance, but in lieu thereof provided: "That nothing in this act shall be construed as an assent by Congress to all or to any of the propositions or claims contained in the ordinance of said constitution of the people of Kansas, or in the resolutions thereto attached * * * * *."
- (4.) Congress refused to agree to this proposition, and by express legislation it imposed an obligation, which, having been accepted by the joint resolution of the State legislature of January 20, 1862, is binding on the United States and on Kansas, that five per cent. of the net proceeds of sales of public lands in the State shall be paid to said State, for the purpose of making public roads, and internal improvements, or for other purposes, as the legislature shall direct.
- (5.) On the part of Congress this legislation was equivalent to making two declarations:
 - First. The United States will not agree to a compact to devote this money to a permanent school fund.
 - Second. On the contrary, the money shall be paid to the State for such purposes as the legislature shall direct.
- (6.) This Congressional declaration of purpose was simply a mode of refusing assent to the proposition of the ordinance.
- (7.) So far as the proposed compact under the ordinance was concerned, it was wholly unnecessary on the part of Congress to give direction to the expenditure of the money, because when Congress refused to agree to a compact to give the money any specific direction, the whole disposition of it was left to the State legislature.
- (8.) It is a maxim in the construction of contracts, that *expressio eorum quae tacite insunt nihil operatur*. (Co. Litt., 191 a; Ives's case, 5 Rep., 11; Boroughes' case, 4 Rep., 72 b.)
- (9.) Construing the "compact" in the light of these principles, it amounts only to this: The United States will pay this money to Kansas, but will have no concern as to what shall be done with it. In other words, there is a simple obligation to pay; nothing less, nothing more.
- (10.) Neither the constitution of the State, nor the right of the people to ordain another constitution according to their wishes and wants, is at all affected by the condition in question.
- (11.) But whether this condition in the act admitting Kansas as a State, did or did not annul the restriction which the State constitution sought to lay upon the legislature, in regard to the disposition of the money, the merits of the present controversy remain totally unaffected.
- (12.) As a matter of history, whenever Congress has required a change in the constitution of a State on its admission into the Union, such change has been specifically required to be made by a formal amendment precedent to the admission of the State; and this was not done as to Kansas.
- (13.) The purpose of the act of Congress of January 29, 1861, was to refuse assent to this ordinance proposition, in order that Congress should be under no express or implied obligation to look after the investment of the money.
- (14.) The act imposed no obligation on the State to apply the money to any specific object; and the State was not deprived of the privilege of apply-

ing it solely to the single object named in the constitution and in the ordinance.

- (15.) On the contrary, the State was admitted into the Union on an equal footing with the original States in all respects whatever. (12 Stats., 126.)
- (16.) This admission gave to Kansas the right possessed respectively by the original States, subject to the Constitution and laws of the United States, to adopt a constitution republican in form, with such provisions as might be deemed proper to its condition.
29. An obligation to pay is, so far as concerns the present matter, that duty which, by the common consent and usage of all nations, and of all men, requires a debtor to pay in money what he owes after deducting the credits to which he is entitled. It is simply that obligation which the United States is under to all of its creditors. It is regulated by the law which governs the payment of all debts, and under which the right to make set-off has always been recognized.
30. If Kansas assumed to pay the direct tax, levied as it was in time of war, for the specific purpose, shown in history if not in the terms of the act, of aiding the Government in its struggle for existence, and it has been conclusively decided in the executive branch of the National Government that the State did so assume, the duty to pay the tax was and is as obligatory upon the State as the duty to meet obligations to Kansas was and is upon the United States.
31. The purpose for which the direct tax was levied was as sacred as that to which the fund derived from the sale of lands in the State has been dedicated by Kansas. The obligation of Kansas was no less binding than that of the United States. Mutual obligations of equal dignity may well be balanced in morals, in equity, and in law. Those who ask equity should do equity.
32. The refusal of the State of Kansas to consent to a set-off in satisfaction of its debt to the United States does not affect the right and duty of the Comptroller to make it. The set-off has been made.
33. If the State has a right under the provisions of the act of March 3, 1875, (18 Stats., 481,) to test in the courts the validity of this action of the accounting officers in relation to Kansas, there is no objection to a compliance with the request made for the institution of a suit by the Secretary of the Treasury; but there may be doubt upon the question whether the United States can, under this statute, sue the State.

By an act of Congress approved August 5, 1861, (12 Stats., 292, 294,) a direct tax of \$20,000,000 was laid upon the United States, and it was declared that—

“The same shall be and is hereby apportioned to the States respectively, in manner following: * * * To the state of Kansas, seventy-one thousand seven hundred and forty-three and one-third dollars.”

The act (section 53) provides in effect as follows: that any State may lawfully (1) assume, (2) assess, (3) collect, and (4) pay into the Treasury of the United States the direct tax, or its quota thereof, in its own way and manner; that any such State which shall give notice by the proper officer thereof to the Secretary of the Treasury on or before the second Tuesday of February next, (1862,) and in each succeeding year there-

after, of its intention to assume and pay, or to assess, collect, and pay into the Treasury of the United States the direct tax imposed by the act, shall be entitled to a deduction of 15 per cent. on the quota apportioned to such State on such parts as shall have been actually paid into the Treasury of the United States; and that the amount of direct tax apportioned to any State shall be liable to be paid and satisfied in whole or in part, by the release of such State, duly executed, to the United States, of any liquidated and determined claim of such State of equal amount against the United States.

See also act May 13, 1862, (12 Stats., 384.)

February 20, 1863, the legislature of Kansas passed "An act to fund the Territorial debt," which provided a mode of ascertaining, in order to the issue of warrants therefor, the amount of the debts due to sundry creditors from the Territory of Kansas prior to the creation of the State; and it therein provides—

SEC. 14. For the purpose of paying off *the special tax due from the State to the General Government*, and securing the assumption, by the United States, of the warrants redeemed under this act, the governor of the State of Kansas is hereby constituted the agent of the State, with full power and authority to take such steps in the premises as may be necessary: *Provided*, He shall have no power or authority to pay off such special tax unless the General Government will receive the warrants aforesaid in liquidation thereof.

April 11, 1881, the State treasurer, in a letter to the governor of Kansas, referring to the State indebtedness under the law, says there are—

Now outstanding State bonds to the amount of \$61,800. These bonds mature July 1, 1883. Under chapter 117, session laws of [March 1] 1864, being "An act to refund to certain counties the Territorial taxes paid," there are now outstanding State bonds to the amount of \$39,675, which will mature July 1, 1884.

The act of March 1, 1864, authorized the issue of State bonds "for the purpose of refunding to certain counties the Territorial tax paid by them in 1860," and required State taxes to be levied to pay for said bonds.

May 11, 1868, a statement was made in the office of the Fifth Auditor in the Treasury Department of the United States, charging the State of Kansas with \$71,743.33 for the direct tax imposed on and apportioned to the State of Kansas; on which the Auditor made his report No. 55626, showing that he had "examined and adjusted an account between the United States and the State of Kansas" on account of said direct tax, and found "that the sum of \$71,743.33 is due from said State to the United States."

May 29, 1868, the then First Comptroller, Hon. Robert W. Tayler, admitted and certified "that \$71,743.33 are due and payable" as stated in the report. (Rev. Stats., 191, 236.)

May 29, 1868, there was charged on the books of the Register of the Treasury Department to the State of Kansas "on account of direct tax, 8th section act of August 5, 1861," "amount due per report No. 55626, \$71,743.33."

In pursuance of the act of Congress approved July 27, 1861, entitled "An act to indemnify the States for expenses incurred by them in defence of the United States," (12 Stats., 276,) the State of Kansas filed a claim in the Treasury Department, April 18, 1862, for \$12,351.04.

September 20, 1867, there was certified by the Second Comptroller in favor of the State of Kansas a balance in settlement of this claim, per Third Auditor's report No. 4938, dated May 11, 1867, of \$9,360.82.

Per Third Auditor's report No. 3372, dated February 3, 1870, the Second Comptroller, on the 15th of March, 1870, directed the \$9,360.82 aforesaid to be carried by counter-warrant to the credit of the State of Kansas, on account of the direct tax due by said State to the United States; which was done by covering-in warrant No. 613, dated March 29, 1870, duly signed by the Secretary of the Treasury, by which the State received credit for \$9,360.82 (being the amount certified by the Second Comptroller as due to the State as aforesaid;) and the Auditor, deducting this from the \$71,743.33 previously found due from the State for direct taxes, reported a balance due from the State of \$62,382.51, which balance was "certified by the First Comptroller December 30, 1874, as due to the United States from the State of Kansas."

April 29, 1878, the Commissioner of the General Land Office stated an account, referred per report No. 29005 to the First Comptroller, showing a balance of \$190,566.08 due the State of Kansas for five per cent. of proceeds of the sales of public lands. (Rev. Stats., 456; act January 28, 1861, 12 Stats., 127.)

May 6, 1880, the then First Comptroller, Hon. A. G. Porter, examined this account and reported to the Secretary of the Treasury a balance due of \$190,268.27, in order to have it reported to the Speaker of the House of Representatives under the act of June 14, 1878. (20 Stats., 130, sec. 4.) It was so reported in December, 1880.

The "deficiency" appropriation act of March 3, 1881, appropriates:

For the State of Kansas, for amount due of the five, three, and two per centum fund to States, one hundred and ninety thousand two hundred and sixty-eight dollars and twenty-seven cents.

This is for "five per centum of the net proceeds of sales of * * * public lands lying within said State," as provided by section 3 of the

act of January 29, 1861. (12 Stats., 127; Rev. Stats., 3689; Audit case, 1 Lawrence, Compt. Dec., 43.)

March 9, 1881, under this appropriation act, and on said report, No. 29005, of the Commissioner of the General Land Office, and in pursuance of the decision of Comptroller Porter of May 6, 1880, the present First Comptroller formally certified a balance due the State of Kansas of \$190,268.27, "to be disposed of as follows, viz: \$62,382.51 to be paid to the Treasurer of the United States, to be by him deposited to the credit of the State of Kansas on account of direct tax, as provided by section 8, act of August 5, 1861, (12 Stats., 295,) and the residue, \$127,885.76, to be paid to the governor of Kansas, the State to be charged with the whole amount."

March 10, 1881, the State of Kansas, by its attorney, presented a paper to the Secretary of the Treasury, claiming that the State of Kansas is entitled to be paid not only the \$127,885.76 certified as due by the First Comptroller, but also said sum of \$62,382.51, and the said \$9,360.82—in all, \$199,629.09. The paper states that it was an error to carry said \$9,360.82 to the credit of the State, but "one which will probably have to be corrected in another way;" and it then asks the Secretary "to have the matter of the liability of the State inquired into;" and to "take such action as may be necessary to cause the warrant to be issued on account of said appropriation for the amount thereof," (\$190,268.27,) without deducting anything on account of the amount apportioned as "Direct taxes charged to the State;" and "that no warrant be signed by" the Secretary "for any sum less than the amount of the appropriation." It alleges that if there could be any liability for direct taxes as to the \$9,360.82 credited, the State is entitled to the 15 per cent. provided for in the 53d section of the direct-tax act.

March 10, 1881, this paper was by the Secretary of the Treasury referred to the First Comptroller "for his consideration."

Hon. S. J. Crawford, ex-governor of Kansas, attorney on behalf of that State, submitted to the Secretary of the Treasury in 1880 a printed argument now filed in this matter, asking that the \$9,360.82 above mentioned "be paid to the State."

He argued that Congress in levying this tax dealt directly with the individual citizens of the United States and not with the States; in support of which he reviewed the history of the Articles of Confederation, of the Constitution and the legislation under it, quoting from the speeches of Madison and Hamilton in the convention ratifying the Constitution; Webster's speech in the Senate February 16, 1833; Stevens, Shellabarger, and Riddle in the House July 24, 1861; and on the

subject of taxation he cited 3 Dallas, 171; 5 Wheat., 317; Story, Const., 14; 1 Kent's Com., 254; Cooley on Taxation, 5, 58, 74, 75; Cooley's Constitutional Limitations, 604; Jones *vs.* Estate of Koop, 19 Wis., 369; Sayles *vs.* Davis, 22 Wis., 226; Collector *vs.* Day, 11 Wall., 124; Ward *vs.* Maryland, 12 Wall., 418; Railroad Co. *vs.* Peniston, 18 Wall., 5; Freedman *vs.* Sigel, 10 Blatch., 327; Union Bank *vs.* Hill, 3 Cold. Tenn., 322; Smith *vs.* Shut, 40 Ala., 766; Moore *vs.* Quick, 105 Mass., 49; s. c., 7 Am. Rep., 499; Warren *vs.* Paul, Am. Law Reg., January, 1865, p. 160; 22 Md., 276; Turner *vs.* Smith, 14 Wall., 562. And he claimed—

First. That the State of Kansas is not liable for any part of the direct tax levied and apportioned by the act of August 5, 1861, (12 Stats., 294.)

Second. That the accounting officers of the Treasury Department erred in charging the said State with the amount apportioned thereto by said act, viz., \$71,743.33½.

Third. That the amount allowed said State on settlement, September 20, 1867, \$9,360.82, under act of July 27, 1861, was without authority of law carried to the credit of the State as a partial payment upon the said direct tax, when the same should have been paid directly to the State.

Hon. Samuel Shellabarger and Hon. Jeremiah M. Wilson, of counsel for the State, made elaborate and able oral arguments, claiming—

I. The State is not indebted to the United States, and so no set-off can be made.

II. If it were otherwise, this five per cent. fund due the State cannot be set off against an indebtedness to the United States, because by compact between the two governments it has been inviolably devoted to the public-school fund of the State. (Const. Kansas, art. vi, sec. 3; act of Congress Jan. 29, 1861, 12 Stats., 126, sec. 3.) Congress agreed to the terms of the Constitution.

III. Under the act of Congress March 3, 1875, (18 Stats., 481,) no set-off can be made without the consent of the State. If the Secretary withholds the money he must "cause legal proceedings to be immediately commenced to enforce the same," &c.

No such legal proceedings can be maintained, because the direct tax was not levied on the State, and hence, as no suit can be brought, the right to make a set-off does not exist.

IV. The State of Kansas never assumed to pay the direct tax.

At a subsequent date, the First Comptroller heard an additional argument on sundry questions pertinent to the matter. Messrs. Shellabarger and Wilson submitted the following points and authorities:

I. Accounting officers had no jurisdiction to settle and adjust a claim against Kansas for direct taxes, and hence their finding that \$71,743.33½ was due for direct taxes is void. This want of jurisdiction is established by the following considerations:

(A) They have no jurisdiction where under the laws of the United States the relation of debtor and creditor, regarding the subject-matter

of the claim, (here direct taxes,) is impossible as between the United States and the party found indebted.

(B) The relations of debtor and creditor, as to the matter of direct taxes, is a legal impossibility, as between the United States and Kansas, except upon and after the assumption by the State of such taxes as provided in section 53 of the direct law of 5th August, 1861, (12 Stats., 311.)

(See Porter's opinion in this case; also McCulloch's opinion, December 28, 1866; 14 Wall., 562, and authorities cited in printed brief.)

(C) The State never so assumed said taxes as required by said section 53, or otherwise, as is shown by the public laws and records, and the accounting officers did not find that the State assumed this tax, and could not find that Kansas so assumed said taxes, because the public records show such finding impossible. Hence their finding of an indebtedness by Kansas is void.

II. Said act of 3d March, 1875, applies to every claim presented to the Secretary of the Treasury for payment after said act took effect, no odds when such claim was settled by the accounting officers. This is the unmistakable sense of the act, and hence it applies to this case.

III. That act compels the Secretary to sue for every set-off which he decides to keep back without the claimant's assent, when the set-off is not one already in suit. And hence the Secretary must sue on this set-off if he retains it against the assent of Kansas.

IV. The United States can sue Kansas for this set-off in the Supreme Court. (Const., sec. 2, art. 3; art. 11, Amendments; 9 Wheat., 906; 5 Pet., 284; 12 Pet., 675-720; 7 How., 660; 17 *Id.*, 478; 23 *Id.*, 505; 11 Wall., 53; 2 Story on Const., sec. 1674, and note 1.)

V. The Secretary is bound to exercise his own judgment, under the act of 3d March, 1875, on the question whether the set-off is one which can be recovered in the court before he decides to retain it and send it to the courts for suit; and he is also bound to take notice of the question whether the accounting officers have jurisdiction to adjust and settle the set-off, and, if they had not, then he is bound to ignore their settlement.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

In May, 1879, it was decided by the then First Comptroller that the direct tax apportioned to the State of Georgia by the acts of August 5, 1861, and of June 7, 1862, was not a debt of the corporate State, which had not by any act assumed it; and that although the tax had not been paid, yet money due from the United States to the State must be paid to the latter, and could not be used by way of set-off or in discharge of any part of the claim for direct taxes. (S. Ex. Doc. No. 24, First Sess. Forty-sixth Congress.) That conclusion is correct in law. The decision of that question was affected somewhat perhaps by the act of June 7, 1862, not applicable to the questions now presented. But the same result would have been reached without reference to it. Under the Constitution, Congress cannot levy or enforce the collection of a tax or assessment on a corporate State which has not assumed it.

The National Government does not operate on States in the collection of revenues, but on persons or property, or both. The power of Congress "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States," is plenary, ample, and subject to no restraint, by or under State authority, and is in no way dependent on State aid or action.

But it is clearly competent for Congress, in the amplitude of its power, to authorize States to assume a proper proportion of any direct tax levied on the property in the United States subject to such tax, such as that levied by the act of August 5, 1861; and then to withhold from such States as assume the tax all moneys due them, respectively, until the debt assumed by any such State is thus paid. For this the act of August 5, 1861, made provision.

The act of Congress, March 3, 1875, (18 Stats., 481,) provides:

That when any final judgment recovered against the United States or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-off, and discharges his judgment or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff, or claimant, denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment, or claim, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch.

In this case there is a sum of \$190,268.27 admitted to be due from the United States to the State of Kansas, as appropriated by the act of March 3, 1881.

Leaving out of view, as proper for determination at another time and "in another way," the question whether the State of Kansas is entitled to a credit of 15 per cent. on \$9,360.82, attention will be directed to the sum of \$190,268.27, of which \$127,885.76 is to be paid to the State; as must also the residue, \$62,382.51, unless (1) it has been so adjudged that the State was (and therefore yet is) indebted to the United States, on account of the direct tax apportioned to it, that the matter cannot be reopened; or (2) it can be now adjudged that the State did assume the payment of the tax.

The questions to be considered are, (1) whether the liability of the State of Kansas to the United States for the direct tax has been so adjudged that it is not now open to question by the executive branch of the Government, and (2) whether, if not so adjudged, the State did assume the liability to pay the direct tax apportioned to it.

I. The liability of the State of Kansas to the United States for the direct tax is so adjudged that it is not now open to question by the executive branch of the Government.

On the 29th of May, 1868, the First Comptroller, on an adjusted account against the State of Kansas in favor of the United States, "certified to the Register of the Treasury" a "balance" of \$71,743.33 due from the State of Kansas to the "United States on account of direct taxes under the act of August 5, 1861," and by like "certified" balance of the Second Comptroller \$9,360.82 was credited to the State on March 29, 1870.

On the 30th of December, 1874, the First Comptroller, after crediting the State of Kansas on the report of the Fifth Auditor with this \$9,360.82, affirmed his former action by again certifying a balance due to the United States from the State of Kansas of \$62,382.51. This creates a conclusive *res adjudicata*, so far as the action of the First Comptroller who is now in office is concerned.

1. This is the effect of section 191 of the Revised Statutes, which provides as follows:

SEC. 191. The *balances* which may from time to time be stated by the Auditor and certified to the heads of Departments by * * * the Comptrollers of the Treasury, upon the settlement of public accounts, shall *not be subject to be changed or modified by the heads of Departments*, but shall be *conclusive upon the executive branch of the Government*, and *be subject to revision only by Congress or the proper courts*. The head of the proper Department, before signing a warrant for any *balance certified to him by a Comptroller*, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the *decision of the Comptroller thereon shall be final and conclusive*, as hereinbefore provided.

Literally, this section applies only to balances certified to "heads of Departments." The certificates made by the First Comptroller are not to the head of a Department, but are directed to the Register, "by whom copies thereof are transmitted to the Secretary of the Treasury:" but they are manifestly within the intent of this section. (15 Op. Att.-Gen., 195.)

The effect of this section, and of a decision on general principles without it, has been elsewhere discussed at some length. (Police case, 1 Lawrence Compt. Dec., 68, note, and 70; Bender's case, *Id.*, 317.

329, 330; Wood's case, *Id.*, 7, 9; Ashton's case, *Id.*, 171; Crocker's case, *Id.*, 297; McKee *vs.* U. S., 12 Ct. Cls., 553; McKnight *vs.* U. S., 13 Ct. Cls., 307.)

This section declares these balances to be "conclusive upon the executive branch of the Government," and it emphasizes this purpose by again declaring that "the decision of the Comptroller shall be final and conclusive, as hereinbefore provided." The binding obligation of this final and conclusive adjudication is made to operate on the whole "executive branch of the Government," which, of course, includes the Secretary of the Treasury and the First Comptroller. The first adjudication made by the First Comptroller, May 29, 1868, certifying a balance due from the State of Kansas, was authorized, and had as its sole purpose to finally decide, as it did, the sum due. (Rev. Stats., 191, 236, 269.) The purpose of the adjudication was to place the United States in a condition to make set-offs, and to accept releases authorized by the 53d section of the act of August 5, 1861. (12 Stats., 311, 312.) For this and all other purposes of the executive branch of the Government, the decision is made final. No question on a claim to be set-off was then decided, nor was any involved, yet to that adjudication the statute gives the force of a finality by its very terms and purpose. (Rev. Stats., 191.) An adjudication which is liable to review and reversal every time it shall happen to be called up is without any element of finality; it is *vox et præterea nihil*.

Section 191 gives a finality to the decision of the First Comptroller as well in regard to claims certified in favor of, as to those against, the United States; since section 236 in express terms authorizes accounts to be certified "in which the United States are concerned, either as debtors or as creditors."

The application now under consideration asks that "no warrant be signed by" the Secretary of the Treasury "for any sum less than the amount of the appropriation." Under the statute, the several decisions mentioned as having been made by the Comptrollers are conclusive on the Secretary of the Treasury, with a right on his part to determine whether there be an appropriation for the payment of the balances certified. (Rev. Stats., sec. 248.) An appropriation having been made by the act of March 3, 1881, the signing of the warrant in pursuance of the decisions of the Comptrollers regularly follows in the ordinary course of business.

2. These final adjudications cannot be reopened for rehearing by request or direction of the Secretary of the Treasury.

a. When a claim against the United States has been rejected, it may

in proper cases be opened for consideration by the direction or on the request of the Secretary of the Treasury. (Wood's case, 1 Lawrence, Compt. Dec., 9; Police case, *Id.*, 70; Viser's case, *Id.*, 75; Ashton's case, *Id.*, 162, 172; Crocker's case, *Id.*, 297; act June 14, 1878, 20 Stats., 130.)

b. The power of the Secretary of the Treasury, under section 191 of the Revised Statutes, to submit to the Comptroller facts affecting the correctness of a balance certified, cannot be exercised when no warrant for payment is required; therefore, when a balance is certified as due to the United States, the account on which it was certified cannot be reopened. This is the effect of the statute, as shown in the decisions already cited—in which will be found references to many others. If it be said that under section 191 of the Revised Statutes, in such case as this, the Secretary of the Treasury may, “before signing a warrant for any balance certified to him by a Comptroller * * * submit to such Comptroller any facts in his judgment affecting the correctness of such balance,” and so that the Comptroller may again decide as to such correctness, it may be answered:

(1.) This section does not apply when no warrant is required, as in this case on the First Comptroller's decision of May 29, 1868. (15 Op. Att.-Gen., 192.)

(2.) The Secretary has not submitted any facts in his judgment affecting the correctness of the balance.

(3.) It is now too late to do so, because the Secretary did sign a covering-in warrant, No. 613, dated March 29, 1870, to carry to the credit of the State of Kansas the sum of \$9,360.82 before referred to; and this was on a statement showing the State of Kansas to be indebted to the United States; and the decision of the Second Comptroller, when ratified, as it has been, by that of the First Comptroller, is final and conclusive.

3. The jurisdiction exercised by the Comptroller was fully authorized.

When the State of Kansas made a claim against the United States, under the act of July 27, 1861, (12 Stats., 276,) it became the duty of the proper accounting officers to examine, adjust, and settle it, and to decide whether there was an indebtedness from the United States to the State of Kansas. The act says that all claims by the State under it are to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury Department. (See Rev. Stats., 236, 248, 269, 277.)

It is to be presumed that the decisions made by the Comptrollers were right; but, whether so or not, they are none the less conclusive on their successors in office. The Revised Statutes provide that “all claims and demands whatever by the United States or against them, and

all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury." (Sec. 236.)

It will thus be seen that claims in favor of the United States are to be settled and adjusted by the proper Auditors, and that the balances arising thereon are to be conclusively certified by the proper Comptroller. These adjudications are not conclusive on Congress, nor in certain cases on the courts; but they are so on the executive branch of the Government. There may be no mode of enforcing such adjudications against a State by any action of the executive branch of the Government, except as liquidation or payment may be secured by charging the balance found due the State with the balance allowed and certified on a claim of the United States against such State. And this is the mode now applicable.

The points decided in the case under consideration rest on the fact that the First Comptroller cannot undo what has been done by his predecessors in office. It is not intended to decide how far in a similar case the action of a Comptroller continuing in office might be reopened for consideration.

4. The right to set-off a debt due exists in favor of the United States, whether the debtor be a State or a person.

a. This arises from the authority conferred on the accounting officers to adjust and settle accounts in favor of, as well as against, the United States. The settlement of an account involves a statement of debit and credit, and the striking of a balance due, and no payment can be required beyond the amount found due.

The doctrine of accounting is derived from the civil law, from which it was adopted into modern systems of jurisprudence. This doctrine was in that law known as *compensatio*, which, as the etymology of the word—*pend-o*—shows, is the act of making things equivalent. It is defined by Modestinus to be *debiti et crediti inter se contributio*. The object of *compensatio*, as in set-off, was the prevention of unnecessary suits and payments. Under the ancient rules of pleading, *compensatio* was permitted only (1) *ex eadem causâ*, in *actiones stricti juris*, in which the inquiry and verdict of the *judex* were limited, in the matter submitted for trial, to the precise and strict terms of the Prætor's formula, which set forth the subject-matter of the action, the claim of the plaintiff, conferred jurisdiction on the *judex* to adjudicate, and directed him to condemn the defendant in a sum of money or else to acquit him; and (2) in *actiones bonæ fidei*, in which, similarly as in our equity jurisdiction, and as implied in the nature of the action, more latitude was allowed

in the pleadings, and a wider jurisdiction was conferred upon the *judex* by the *formula* delivered to him by the Prætor. By a rescript of M. Aurelius, the *exceptio compensatio*, or plea of set-off, was admitted in actions as fully as is provided in modern statutes.

The act of July 27, 1861, (12 Stats., 276,) requires the claims of States to be "settled." The other statutes giving accounting officers jurisdiction confer authority to make settlements. These give the authority to make the set-off, thus investing the accounting officers with a jurisdiction which always existed in courts of equity, and which exists in courts of law by force of statute.

b. The usage has always been to make the set-off in adjusting claims of creditors of the United States; and usages sufficiently continued, when not clearly against a statute, is law. It is evidence of what the law is.

c. The right to make the set-off is fully supported by authority.

In *Gratitot vs. The United States* (15 Peters, 370) it was said by the Supreme Court, in relation to the right of the Government to make a set-off in adjusting accounts, that—

"It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him."

(See Rev. Stats., 191, 236, 277, 286, 1059, 1061, 1766, 4734, 5073; Viser's case, 1 Lawrence, Compt. Dec., 75; *United States vs. Wilkins*, 6 Wheat., 145; *De Groot vs. United States*, 5 Wall., 432; *United States vs. Eckford*, 6 Wall., 484; *Tillou's case*, 7 Ct. Cls., 18; *Bonnafon vs. United States*, 14 Ct. Cls., 484; *Green vs. Farmer*, 4 Burr., 2220; s. c., 1 W. Blackst., 652; *Stanley vs. Gadsby*, 10 Peters, 522; 3 Op. Att.-Gen., 1, 52, 163; 4 Op., 33, 380; *McKnight vs. United States*, 98 U. S., 186; *United States vs. Lyman*, 1 Mason, C. C., 482.)

d. The act of March 3, 1875, (18 Stats., 481,) is not material in this case, except as it may apply to a right now to make a set-off, or involve the question of a duty to commence proceedings in court on a disputed question of set-off. It was passed after the set-offs hereinbefore referred to were made by the First Comptroller and Second Comptroller.

Since it has been decided that Kansas was, and hence is yet, indebted to the United States, the set-off now under consideration can be made either (1) without the aid of the act of 1875, or (2) by virtue of its provisions. The usage already referred to, of making set-offs, is as applicable now as ever heretofore, unless the power has been abridged by the act of 1875; and it does not appear that the act has such effect.

It is an enabling, and perhaps unnecessary, act for all purposes of a right to make a set-off. It disables nothing. It is not negative in its terms, and hence repeals no usage founded on law previously existing.

A negative statute controls and takes away a statutory or a common-law right or remedy previously existing, but an affirmative statute has no such effect. (Sedgwick, Stat. and Const. L., 31; Dwarries, Stat., 475.)

It is urged that the act of March 3, 1875, cannot, unless the State assents, authorize the set-off in this case before the liability for the debt is determined against the State in a court of competent jurisdiction. Even if a State be not liable to suit, it does not follow that the statute does not authorize the set-off now to be made. The statute is remedial, and by a well-known rule of construction is to be liberally construed. But it is not necessary to invoke even this rule. The terms of the act apply alike to persons who can, and to those who cannot, be sued, and to cases in which suit cannot be instituted, as well as to those in which legal proceedings can be commenced and enforced. If a claimant reside abroad, where he is not amenable to the process of our courts, the statutes give the right to make the set-off. The fact that every remedy given by the statute cannot be pursued in every case, and in every mode, cannot, according to any fair rule of construction, be used to defeat entirely the right of set-off. The act can only mean, then, that when the right to make a set-off against a claimant is by him disputed, the Secretary must "cause legal proceedings to be immediately commenced" in those cases where such suits can be lawfully commenced. It does not give a new jurisdiction to courts or require an impossibility. It is not a repealing act. It leaves in force all the statutes giving jurisdiction to accounting officers and finality to the adjudications of the Comptroller. It is to be read with these acts, and to be so construed as to take away none of their provisions. When it declares "it shall be the duty of the Secretary to withhold payment," this means that in those cases adjudicated by the Comptroller, the payment is to be withheld in accordance with such adjudications; and payment may perhaps be withheld in other cases, in anticipation of the adjustment of accounts. And, clearly, it cannot authorize a payment by order of the Secretary in opposition to such an adjudication, since that would make it operate as a repeal in part of section 191 of the Revised Statutes.

c. The act of August 5, 1861, (12 Stats., 311, sec. 53,) provides that—

"The amount of direct tax, apportioned to any State, Territory, or the District of Columbia, shall be liable to be paid and satisfied, in whole or in part, by the release of such State, Territory, or District, duly executed, to the United States, of any liquidated and determined claim of such State, Territory, or District, of equal amount against the United States: *Provided*, That, in case of such release, such State, Territory, or District shall be allowed the same abatement of the amount of such tax as would be allowed in case of payment of the same in money."

No "release" has "been duly executed to the United States" by the State of Kansas, so as to give it the right to an abatement of 15 per cent. Such release is requisite as a waiver of any right which might be asserted by an appeal to Congress or the courts. (Rev. Stats., 191, 1059.) This act does not repeal any prior or other common-law or statutory right to make the set-off. It is not negative in its terms. It recognizes the right of the United States to make a set-off against a State, and provides for a release by the State in order to end all controversy.

As to claims allowed for war expenses paid by any State, and to be received as a credit on the direct tax, it was provided by the act of May 13, 1862, (12 Stats., 384,) that they should be filed before July 30, 1862. No limitation was made as to other claims.

II.—Did the State of Kansas "assume" the liability to pay the direct tax apportioned to it?

The Comptrollers have decided that it did. The failure of the State to object to a decision of the Comptroller, which was twice affirmed within a period of twelve years, from 1868 to 1880, is persuasive evidence that it was accepted by the proper authorities of Kansas.

The act of the general assembly of Kansas of February 20, 1863, before referred to, declares that—

"For the purpose of paying off the special tax due from the State to the General Government, and securing the assumption by the United States of the warrants redeemed under this act, the governor of the State of Kansas is hereby constituted the agent of the State with full power
* * *"

It was, however, provided that the governor should have no authority to pay off such special tax unless the General Government would receive the warrants therein mentioned. It is not shown that the United States consented, or that it was under any legal or moral obligation to accept these warrants, or any debt of the original Territory for which they were issued. The United States has never held itself liable to pay the debts of its Territorial governments. If the United States had been indebted to the State of Kansas, the liability could not by law be adjudged by the authority of that State alone. The laws of the United States are a part of "the supreme law of the land." (Const., Art. VI.) These determine how the claims of a State are to be adjusted and paid. Section 236 of the Revised Statutes requires them to be presented to, and to be settled and adjusted in, the Department of the Treasury, just as was the claim of the State of Kansas under the act of July 27, 1861, (12 Stats., 276.) A State cannot be permitted to set up its own law or its own adjudications against the United

States, and then to determine for itself "the mode and measure of redress," without reference to the supreme law of the United States. A failure for so long a period as twelve years to present claims to be passed upon in the authorized mode, does not furnish convincing evidence of their legal validity. The United States is ready, able, and willing to meet all just demands. The world-wide and unsullied character of the United States for the faithful observance of all its obligations is one of the grandest facts of our national history. But without undertaking to pass upon the question of the liability of the State for the direct tax, the State itself, by its own legislation, would seem to have afforded sufficient ground for a decision in the affirmative. The Kansas statute, referring as it did to the direct tax apportioned to that State by the act of August 5, 1861, and containing these words: "for the purpose of paying off the special tax due from the *State* to the General Government," is a distinct acknowledgment that the sum apportioned to the State was "due from the *State* to the General Government." It is true, the act declared in effect that it would not permit payment of the debt therein admitted by its terms to be due, unless it could be paid, not in legal-tender, but in the mode it pointed out; namely, in evidences of debt to be audited and fixed in amount by the officers of the State, with no voice in the matter on the part of the United States.

The First Comptroller was dealing with a purely legal question, when he decided that the State of Kansas was indebted for the direct tax to the United States. The act of August 5, 1861, provided that each State "may lawfully [1] assume, [2] assess, [3] collect, and [4] pay into the Treasury of the United States its quota" of the direct tax. Here are four several acts. The State might do one or all of them. Each act was independent of the other. A mere assumption of the debt might be all that would be necessary on the part of any State having claims sufficient in amount to pay it which could be lawfully allowed by and against the United States. If the State assumed its quota, but did not pay, it would, nevertheless, thereby have created a debt or obligation on the part of the State; and the fact is, that the State did, by the act of February 20, 1863, solemnly admit and declare "the special [direct] tax due from the State to the General Government." It was, doubtless, supposed by the legislature of Kansas that this act of assumption was all that was needed. That body probably hoped that the quota of the direct tax apportioned to Kansas could be satisfied or paid in the mode provided by the act of assumption. It was well known that the State was incurring war expenses for which it would be entitled to reimbursement by the United States; and in addition to

the claims which have been allowed and credited to Kansas, there are still under consideration in the Treasury Department large claims for war expenses, preferred by that State against the United States, which may result in allowances and payments.

The account against the State of Kansas for its quota of direct tax has been "stated and certified."

The Comptrollers seem to have held that an acknowledgment that a debt is due, is in itself an assumption of the debt; in other words, that when the legislature of Kansas admitted the "special" [direct] tax to be due from the State to the United States, the State did thereby "assume" its quota of the direct tax within the meaning of the act of August 5, 1861. In so holding they were fortified by strong authorities in law. If a common-law action of *assumpsit* be brought upon an *insimul computassent* for money due, or, as it is sometimes said, "upon an account stated," evidence that a fixed and certain sum was admitted to be due supports the action, and so proves that the defendant, in legal parlance, "assumed" the payment of the liability. (2 Greenleaf, Evidence, secs. 126, 127.) A debtor, having thus assumed a debt, is not at liberty to pay it in such a mode as he may choose, much less not to pay at all. The law requires payment in such case, and prescribes the mode; namely, by a legal-tender of money, or by a set-off. If any question be made as to whether the State assumed the direct tax within proper time, it may well be said that the United States is making no objection on that account; and certainly the State cannot, in view of its statutory admission of indebtedness, and of the right of set-off shown to exist, require the objection to be made.

The question of "compact" between the United States and the State of Kansas as to this fund is one which it may be proper to consider.

The "ordinance" of July 29, 1859, adopted by the convention which framed the constitution of Kansas, proposed to Congress that the State be admitted into the Union, provided certain conditions be agreed to by Congress, among which is the following:

"6. That five per centum of the proceeds of public lands in Kansas as disposed of after the admission of the State into the Union shall be paid to the State for a fund, the income of which shall be used for the support of common schools."

The State constitution itself contains this provision:

"Such per cent. as may be granted by Congress on the sale of lands in this State, shall be the common property of the State, and shall be a perpetual school-fund, which shall not be diminished, but the interest of which, together with all the rents of the lands, and such other means as the legislature may provide, by tax or otherwise, shall be inviolably appropriated to the support of common schools." (Art. VI, sec. 3.)

Congress, in passing the act of January 29, 1861, admitting the State into the Union, did not agree to this proposition of the ordinance, but in lieu thereof did provide—

“That nothing in this act shall be construed as an assent by Congress to all or to any of the propositions or claims contained in the ordinance of said constitution of the people of Kansas, or in the resolutions thereto attached; but the following propositions are hereby offered to the said people of Kansas for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon said State of Kansas, to-wit: * * * That five per centum of the net proceeds of sales of all public lands lying within said State which shall be sold by Congress after the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to said State for the purpose of making public roads and internal improvements, or for other purposes, as the legislature shall direct.”

By an act of the Kansas legislature of June 4, 1861, “to provide for the management and investment of the school-fund and university fund,” it is provided that—

“Such per cent. as may be granted by Congress on the sale of lands in this State, shall be the common property of the State, and shall be a perpetual school-fund, which shall not be diminished, but the interest of which, together with all the rents of the lands, and such other means as the legislature may provide by a tax, or otherwise, shall be invariably appropriated to the support of common schools.”

By the act approved May, 1861, “for the regulation and support of common schools,” it is provided that—

“SEC. 72. The income of the State school-fund and the annual taxes collected by the State for the support of schools, which shall be received up to the first day of January of each year, shall be distributed annually, between the first day of February and the first day of March in each year, among the several counties of the State from which reports have been received by the State superintendent of public instruction, in proportion to the number of children resident therein over the age of five and under the age of twenty-one years.”

A joint resolution of the Kansas legislature, approved January 20, 1862, accepted the proposition respecting the five per cent. fund contained in the act of Congress of January 29, 1861. (12 Stats., 127.)

The Kansas act of March 3, 1868, requires “the board for the management of the State permanent school and university funds” to invest these funds in State or United States bonds.

It is claimed that there is in this legislation a “compact,” “obligatory on the United States and upon the said State of Kansas,” which requires the absolute payment in money, by the United States to the State, of the whole amount now in controversy, in order that it may be invested in a permanent school-fund, which is not to be “diminished” by any counter-claim or set-off; in other words, that a set-off would

defeat the purpose of the compact, under which, as construed by the State, the whole of the money is to be invested in a permanent school-fund. Nothing in this legislation can now defeat the right of set-off exercised by the Treasury Department. The repeated adjudications heretofore made are, as already shown, and as section 191 of the Revised Statutes declares, "conclusive upon the executive branch of the Government," and "subject to revision only by Congress or the proper courts." There is now no authority, except in Congress or the courts, to inquire whether the adjudications of the accounting officers of the Treasury Department in respect of the liability of the State for the direct tax, and of the right of set-off, on the part of the United States, were made in accordance with law. The legal validity of the adjudications made can be sustained with reasons of great weight. It is not necessary, nor is it intended, now to decide as to whether the adjudications were legally right or not. But simple justice to the learned and able officers who made them, renders it proper to state some of the grounds on which the adjudications might have been legally made.

Assuming that the "compact," or agreement, in regard to sales of public lands in the State, has the force of law, it is well to ascertain its scope and purport. It will be seen that the "ordinance" asked Congress to agree by law that five per cent. of the proceeds of public lands sold should be paid to the State for a fund, the income of which should be used for the support of common schools. Congress refused to agree to this proposition; and by express legislation it imposed an obligation, which, having been accepted by the joint resolution of the State legislature, of January 20, 1862, is binding on the United States and on Kansas, that five per cent. of the net proceeds of sales of public lands in the State shall be paid to said State, for the purpose of making public roads, and internal improvements, or for other purposes, as the legislature shall direct.* On the part of Congress this legislation was equivalent to making two declarations:

First. The United States will not agree to a compact to devote this money to a permanent school-fund.

Second. On the contrary, the money shall be paid to the State for such "purposes as the legislature shall direct."

This Congressional declaration of purpose was simply a mode of re-

* For some purposes Indian reservations are not public lands, especially when the fee has been granted to a tribe. (*Holden vs. Joy*, 17 Wall., 232, 247; *L. L. & G. R. R. Co. vs. United States*, 92 U. S., 733; *Wood vs. M. K. & T. R. R. Co.*, 11 Kansas, (2 Webb,) 323.)

For other purposes they have been deemed "public lands." (*Beecher vs. Wetherby*, 95 U. S., 517, 524; *Cooper vs. Roberts*, 18 How., 173; *United States vs. Cook*, 19 Wall., 591.)

fusing assent to the proposition of the "ordinance." So far as the proposed compact under the "ordinance" was concerned, it was wholly unnecessary on the part of Congress to give direction to the expenditure of the money; because when Congress refused to agree to a compact to give the money any specific direction, the whole disposition of it was left to the State legislature. It is a maxim in the construction of contracts, that *expressio eorum quæ tacitè insunt nihil operatur*. (Co. Litt., 191 a; Ive's case, 5 Rep., 11; Boroughes' case, 4 Rep., 72 b.)

Construing the "compact" in the light of these principles, it amounts only to this: The United States will pay this money to Kansas, but will have no concern as to what shall be done with it. In other words, there is a simple obligation to pay; nothing less, nothing more. And what is an obligation to pay? It is, so far as concerns the present matter, that obligation which, by the common consent and usage of all nations and of all men, requires a debtor to pay in money what he owes after deducting the credits to which he is entitled. It is simply that obligation which the United States is under to all of its creditors. It is regulated by the law which governs the payment of all debts, and under which the right to make set-off has always been recognized.

Though it may be said with some plausibility that the condition imposed by Congress respecting the disposition of the five per cent. of the net proceeds of the sales of public lands in Kansas is in contravention of the provision in the constitution of that State which has been quoted above, and that it dispenses the Kansas legislature from the limitation imposed by that provision; yet, it will be found, on a closer examination, that this view of the action of Congress is not sound, and that neither the constitution of the State, nor the right of the people to ordain another constitution according to their wishes and wants, is at all affected by the condition in question. But whether this condition did or did not annul the restriction which the State constitution sought to lay upon the legislature, in regard to the disposition of the money, the merits of the present controversy remain totally unaffected. As a matter of history, whenever Congress has required a change in the constitution of a State on its admission into the Union, such change has been specifically required to be made by a formal amendment precedent to the admission of the State; and this was not done as to Kansas.

The act of Congress of January 29, 1861, in refusing to agree to the proposed condition as to this five per cent. fund, was dealing with the ordinance. The purpose of the act was to refuse assent to this ordinance proposition, in order that Congress should be under no express or implied obligation to look after the investment of the money. The

act imposed no obligation on the State to apply the money to any specific object; and the State was not deprived of the privilege of applying it solely to the single object named in the constitution and in the ordinance. On the contrary, the State was admitted into the Union on an equal footing with the original States in all respects whatever. (12 Stats., 126.) This admission gave to Kansas the right possessed respectively by the original States, subject to the Constitution and laws of the United States, to adopt a constitution republican in form, with such provisions as might be deemed proper to its condition. It is to be observed that the acceptance by the people of Kansas of the five conditions offered by Congress in the act of admission, including the condition as to five per centum of the net proceeds of sales of public lands, was not made essential to the admission of the State into the Union. They were offered, as the act says, to the "people of Kansas for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Kansas."

If Kansas assumed to pay the direct tax, levied as it was in time of war for the specific purpose, shown in history if not in the terms of the act, of aiding the Government in its struggle for the maintenance of the Union, and it has been conclusively decided in the executive branch of the National Government that the State did so assume, then the duty to pay the tax was and is as obligatory upon the State as the duty to meet obligations to Kansas was and is upon the United States. The purpose for which the direct tax was levied was as sacred as that to which this five per cent. fund has been dedicated by Kansas. The obligation of Kansas was no less binding than that of the United States. Mutual obligations of equal dignity may well be balanced in morals, in equity, and in law. Those who ask equity should do equity. Every State is presumed to be able to meet its obligations; and Kansas is so in fact as well as in theory. The school-fund cannot suffer if Kansas continue to be as true to herself as she has been in the past.

The Secretary of the Treasury will be advised that a warrant should issue to pay to the governor of Kansas \$127,885.76; and to pay to the Treasurer of the United States \$62,382.51, to be by him deposited to the credit of the State of Kansas on account of direct tax.

TREASURY DEPARTMENT,

First Comptroller's Office, May 21, 1881.

LATER PROCEEDINGS IN THE MATTER.

May 21, 1881, the State of Kansas, by its attorneys, addressed to the Secretary of the Treasury a communication refusing to consent to the set-off as proposed to be made in the Treasury Department, and de-

manding that the Secretary shall cause legal proceedings to be immediately commenced in order that the matter of the said alleged indebtedness of the State of Kansas for direct tax be tried and decided by the judiciary, and to cause the same to be prosecuted to final judgment with all reasonable dispatch, as provided in the act of March 3, 1875.

May 24, 1881, this communication was, by the Secretary, referred to the First Comptroller.

June 22, 1881, War warrant No. 3800 was issued in favor of the State of Kansas for \$26,604.05, under the act of July 27, 1861, (12 Stats., 276,) for expenses incurred by the State of Kansas for the United States during the rebellion. The amount payable on this warrant was afterwards directed to be deposited by the Treasurer of the United States to the credit of Kansas on account of direct tax due from that State.

June 23, 1881, the First Comptroller annulled the certificate made by him under date of March 9, 1881, directing \$62,382.51 to be deposited to the credit of the State of Kansas, and substituted therefor the following:

“Of the \$190,268.27 found due the State of Kansas, pay \$154,489.81 to the governor at Topeka, Kansas, the residue, \$35,778.46, to be paid to the United States Treasurer, to be by him deposited to the credit of the State of Kansas, on account of direct tax, as provided by section 8, act of August 5, 1861. (12 U.S. Stats., 292.) Pay from deficiency act of March 3, 1882, five per cent. fund of the net proceeds of sales of public lands in Kansas prior to July 1, 1878, the State to be charged with the whole amount.”

The effect of this action is to credit the State, by way of set-off, on the direct-tax account, with the amount of said War warrant, \$26,604.05, and also with \$35,778.46 out of the \$190,268.27 found due the State on account of the five per cent. fund, as above.

June 23, 1881, a warrant on the Treasurer was issued, and countersigned accordingly.

Upon the reference made by the Secretary to the First Comptroller, *May 24, 1881*, the following is the—

OPINION OF THE FIRST COMPTROLLER:

The refusal of the State of Kansas to consent to a set-off in satisfaction of its debt to the United States does not affect the right and duty of the Comptroller to make it. The set-off has been made. If the State has a right under the provisions of the act of March 3, 1875, (18 Stats., 481,) to test in the courts the validity of this action, there is no objection to a compliance with the request made.

There may be doubt upon the question whether the United States

can under this statute sue the State of Kansas. In 1 Kent's Commentaries, 9th ed., 326, *note*, it is said:

"1st. No citizen of any of the States or subject of a foreign State, can sue a State. 2d. A foreign State may sue one of the States before the Supreme Court of the United States, and there only. 3d. The United States cannot be sued. 4th. *The United States may sue a State*, and perhaps they may *as a bond fide* assignee of an individual creditor of a State, and perhaps an individual State or a foreign State, as such assignee, may do it."

(See Waterman on Set-off, 2d ed., § 39; *Commonwealth vs. Matlack*, 4 Dall., 303; *Cohens vs. Virginia*, 6 Wheat., 382; *United States vs. Giles*, 9 Cr., 227, 228, 236, 237; *United States vs. Robeson*, 9 Pet., 322, 328; *Gale vs. Babcock*, 4 Wash. C. C., 199; s. c. *nom.* *State of New Jersey*, and *Gale vs. Babcock*, *Id.*, 344; *United States vs. Barker*, 1 Pa. C. C., 160, 174; *Chisholm vs. Georgia*, 2 Dall., 419; *Hollingsworth vs. Virginia*, 3 Dall., 378.)

As the prosecution of an action or suit in the courts is a work intrusted to the Department of Justice, it would seem proper that the request made on behalf of the State of Kansas be referred to the Attorney-General, and the Secretary is advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, June 25, 1881.

The following will explain the subsequent action:

DEPARTMENT OF JUSTICE,
Washington, D. C., October 21, 1881.

Hon. WM. WINDOM,
Secretary of the Treasury.

SIR: I have the honor to return herewith the communication of the First Comptroller, dated the 6th of August last, and accompanying papers, relative to the application in behalf of the State of Kansas for payment of the full sum of \$190,268.27, appropriated by the act of March 3, 1881. It appears that as far back as 1868 the then First Comptroller having decided that the State of Kansas had assumed the direct tax apportioned to that State by the direct-tax act of August 5, 1861, and was indebted to the United States for the amount thus apportioned, (71,743.33,) stated an account in favor of the United States and against the State, in which that amount was found due from the State to the United States, and it was accordingly charged to the State on the books of the Treasury.

Subsequently certain indebtedness on the part of the United States to the State of Kansas on account of war expenses was credited to the State against the amount charged as aforesaid, and recently, in stating an account for the amount appropriated by the act of 1881 above mentioned, the sum of \$62,382.51, which is the balance remaining charged against the State on account of the direct tax, was directed by the Comptroller to be retained out of that amount, and to be applied to the credit of the State on account of such tax.

It is claimed by the attorneys acting in behalf of the State of Kansas that the State never assumed the tax, and was never indebted therefor to the United States, and they declare that the State does not consent to have the same set-off against her claims against the United States. They accordingly ask that, in view of all the facts, and also of the provisions of the act of March 3, 1875, chap. 149, the Secretary of the Treasury cause suit to be brought against the State under that act to establish the validity of the indebtedness of the State for the direct tax. At the suggestion of the

Comptroller, you, on the 5th instant, referred his communication, with the other papers, to this Department, for such action in regard to the question of bringing suit as may be thought proper.

Without expressing any opinion upon the general question of whether the United States can sue a State (as to which the Comptroller entertains "serious doubts,") I am inclined to the view that such a proceeding is not contemplated by the act of March 3, 1875, and that consequently no duty devolves upon you under that act to institute a suit in this case against the State of Kansas. In this connection I would suggest that the State may have a remedy in the Court of Claims. There are two instances, I understand, wherein suits have been brought in that court by a State against the United States, and although neither of them proceeded to judgment (each being dismissed for want of prosecution,) yet in neither was any point raised as to the jurisdiction. I deem it proper, under the circumstances, to recommend that no suit be brought by the United States, but that the amount claimed to be due from the State to the United States, on account of the direct tax, be retained, leaving the State to its remedy in the Court of Claims, should it deem that course advisable.

I am, sir, very respectfully,

WAYNE MACVEAGH, *Attorney-General.*

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., October 29, 1881.

Messrs. SHELLABARGER AND WILSON.

GENTLEMEN: Referring to your letter of March 10, 1881, in relation to the claim against the State of Kansas on account of direct tax, I have to inform you that in accordance with the recommendation of the Attorney-General of the 21st instant, a copy of which is enclosed, the amounts withheld from the State of Kansas on War warrant No. 3800 and Interior civil warrant No. 1003, issued respectively on June 22 and 24, 1881, amounting in the aggregate to \$62,382.51, have been deposited in the Treasury of the United States to the credit of the State of Kansas on account of direct tax assessed under act of Congress approved August 5, 1861.

Very respectfully,

H. F. FRENCH, *Acting Secretary.*

TREASURY DEPARTMENT, October 28, 1881.

Respectfully referred to the honorable First Comptroller for his information.

The Treasurer United States has been directed to deposit in the Treasury to the credit of the State of Kansas, on account of direct tax, the amounts withheld on War warrant No. 3800 and Interior civil warrant No. 1003, issued respectively on June 22 and 24, 1881, amounting to \$62,382.51.

H. F. FRENCH, *Acting Secretary.*

IN THE MATTER OF THE SIXTH AUDITOR'S AUTHORITY TO APPLY RECEIPTS UNDER A POSTMASTER'S SECOND BOND TO LIQUIDATION OF BALANCE DUE UNDER HIS FIRST BOND.—MARTIN'S CASE.

1. When the [Sixth] Auditor of the Treasury for the Post-Office Department has settled the accounts of a postmaster, the *sureties* on the official bond of such postmaster have no right of appeal from such settlement.
2. There is no right of appeal on the part of either principal or sureties from the action of such Auditor in directing suit to be brought on the official bond of a delinquent postmaster.
3. Such direction, however, does not defeat the right of the person whose accounts have been settled to appeal to the First Comptroller from the settlement made by the Auditor.

4. When an official bond to the United States is "conditioned for the faithful discharge of all duties and trusts," a surety thereon is not liable, by the *terms of such bond unaffected by statute*, for a defalcation occasioned by the application of money officially received during the term of office covered by such bond in payment of a liability to the United States accruing during a previous term of such officer, when the proper officer of the Government, charged with the duty of applying the money so received, has notice or knowledge of the source from which it comes
5. If the sureties on the bond of an officer for a second term assent to such application of money received during such term, they are estopped from denying the legality of the application.
6. Section 3835 of the Revised Statutes has, as to postmasters' official bonds, changed the common-law rule in respect to the liability of sureties, by providing that "whenever a postmaster is required to execute a new bond, all payments made by him after the execution of such new bond may, if the Postmaster-General or the Sixth Auditor deem it just, be applied first to discharge any balance which may be due from such postmaster under his old bond."
7. It is a general rule that when an officer is reappointed or re-elected for a second or other subsequent term of office, and bonds are given in pursuance of a requirement of law for each term, the sureties on each bond are liable only for defaults occurring in the term for which it was given.
8. If moneys received under a second official bond are applied by the principal, not as required by such bond and by the law, but in satisfaction of a prior liability, this would of itself be a breach of the second bond for which the sureties would be liable.
9. Where Congress has prescribed the extent of the liability of sureties on official bonds, the sureties cannot plead ignorance of the law, or of its effect on their contract of suretyship. *Ignorantia juris non excusat.*
10. All the provisions of a statute regulating the institution of suits, and the recovery of unpaid balances from delinquent officers, are as much a part of their bonds as if they were recited in their conditions.
11. A contract is not merely that which the parties expressly stipulate. It is that, also, which the existing laws of the country, where the contract is made, annex as conditions to it at the time when it was formed. These conditions enter into the contract, and form a part of it as completely as if they had been expressly stipulated by the parties themselves.

March 10, 1875, John J. Martin was appointed, after confirmation by the Senate, postmaster at Montgomery, Alabama. He gave bond in due form May 27, 1875, which took effect when he assumed the duties of the office, July 1, 1875. (Rev. Stats., 3834.)

On the adjustment of his accounts to December 31, 1877, it appeared by the balance certified that he was indebted in \$896.24 to the United States, for which sum a draft was drawn against him by the Postmaster-General in favor of M. D. Wickersham, postmaster at Mobile, which was paid April 12, 1878. October 13, 1877, Mr. Martin gave a new bond, with new sureties, as postmaster at said place, and the sureties on the prior bond were released from responsibility for all acts

or defaults of the postmaster which might be done or committed subsequent to the last day of the quarter in which the new bond was executed and accepted. (Rev. Stats., 3837.)

March 10, 1879, Mr. Martin's term of office expired, when there was, by the settlement of the Sixth Auditor, a balance found due from him to the United States of \$2,317.89, for which sum a draft was drawn upon him by the Postmaster-General in favor of his successor in office. Payment of this draft was by the latter demanded of Mr. Martin and of the sureties on the second bond, and it was refused; whereupon the draft was returned to and cancelled by the Sixth Auditor. November 30, 1880, the Sixth Auditor requested the Solicitor of the Treasury to bring suit on the last bond for the sum stated to be due. March 1, 1881, notice of appeal to the First Comptroller from the settlement of the account by the Sixth Auditor was filed in this office by B. F. Noble and J. W. Hale, two of the sureties on the second bond. The notice does not particularly specify the grounds of appeal.

Among the papers transmitted to the First Comptroller by the Sixth Auditor—the Auditor of the Treasury for the Post-Office Department—is a notice of appeal by said sureties, dated January 31, 1881, stating and alleging two grounds of appeal:

First. That the postmaster's account "was short on the 31st day of December, 1877, \$1,226.76, and had been short some \$1,500 for more than twelve months, as is alleged, by the default of a clerk by the name of Atkinson, and this was known to the Department, and indulgence was granted him, (Martin,) and he was not required, or did not settle up his account on the 31st of December;" that the draft for \$896.24 (to which sum the balance had been reduced) "was paid in cash taken from the funds that came into the office after the first day of January, 1878;" that this was a misapplication of funds; and that the amount should be allowed in the settlement of the account under the second bond.

Second. That the appellants "are entitled to a credit of \$108.22 for services rendered as clerks in the fourth quarter of 1877, and which was not paid at the time (December 31, 1877) because the postmaster did not have the means of doing so."

With regard to the first point of appeal, the Auditor says, in a letter dated March 30, 1881: "This office can only state that the draft for the balance due on the old account was regularly drawn and paid, and the payment is duly credited to that account, and it is not advised other than by the papers * * * from whence was derived the funds with which payment was made; neither is it regarded as material, as the

law (sec. 3835, Rev. Stats.) expressly authorizes such an application of payments as it is claimed was made in this case."

Among the papers received from the Auditor there is one containing an extract from a report made to the Postmaster-General by a special agent, who states that on the 30th of September, 1877, there was a deficit of \$1,786.27 at the Montgomery office; "\$1,530.48 of this is the sum in which Charles J. Atkinson, late assistant postmaster, was discovered to be in default on November 30, 1876."

There is also a letter from B. W. Martin (son of the postmaster) to the Auditor, dated November 27, 1880, certifying that while he was acting as assistant postmaster, on the 12th day of April, 1878, the draft for \$896.24, in favor of M. D. Wickersham, was paid by him from the funds of the office received after January 1, 1878.

The sureties on the second bond were employed as clerks in the office at the time the bond was given.

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

Several questions arise on the papers in this appeal from the decision made by the Sixth Auditor in the settlement of the accounts of the postmaster at Montgomery.

I.—An appeal is authorized by section 270 of the Revised Statutes:

"Whenever the Postmaster-General or any person whose accounts have been settled by the Sixth Auditor is dissatisfied with the settlement made by the Auditor, he may, within twelve months, appeal to the First Comptroller, whose decision shall be conclusive."

In this case the appeal is made by the sureties on the second bond; Mr. Martin, the late postmaster, whose accounts have been settled by the Sixth Auditor, has taken no appeal. No account has been stated with the sureties; they, therefore, upon the plain language of the statute, have no right to appeal; the attempt by them to take an appeal is unauthorized and void.

This disposes of the so-called appeal; but in view of the importance of other questions presented in connection with the case, an expression of opinion on some of them may be proper.

The Sixth Auditor has requested the Solicitor of the Treasury Department to commence suit to recover the sum found due the United States by the Auditor's settlement of Mr. Martin's accounts.

The Revised Statutes provide that—

"In case of delinquency of any postmaster, contractor, or other officer, agent, or employé of the Post-Office Department, in which suit is brought, the Sixth Auditor shall forward to the Department of Jus-

tice certified copies of all papers in his office tending to sustain the claim." (Section 296.)

The particular form of the request made by the Auditor, whether to sue on the second or the first bond, or to institute suit against the late postmaster alone, is not material. There is no appeal from the request; but such request cannot defeat the right of the person whose accounts have been settled to appeal to the First Comptroller from the settlement made by the Auditor.

II.—If it be assumed, without further evidence, that the facts are as alleged by the sureties, the question of law arises, whether the Sixth Auditor properly stated the account and certified the balance due from the late postmaster. It is clear from the language of the statute that this is the *only question* which can be raised by their appeal.

An examination of the returns made by the postmaster, and of the papers on file with this case, shows that the account was properly stated and the true balance duly certified.

It is claimed that the Sixth Auditor should have credited the balance which accrued against the postmaster after January 1, 1878, with the \$896.24 which were used to pay the draft for that sum, because this money was "cash taken from the funds that came into the post office *after*" the second bond took effect, January 1, 1878.

The Sixth Auditor did not err in making the appropriation of this payment to the credit of the postmaster in the settlement of the accounts under the first bond.

1. It is not shown that when the draft for the \$896.24 was paid either the Postmaster-General or the Sixth Auditor *knew* the source from which the money came.

It is laid down in *State vs. Smith* (26 Missouri, 226) that where a collector of the revenue with different sets of sureties for a first and second term of office appropriates funds collected during his second term to the discharge of a deficit in the account of his first term, the payment is good and cannot be disturbed if the party receiving it acted in good faith; and in such case the creditor who has received the money and rendered an account of its application to the previous liability cannot thereafter elect to appropriate it in a different manner so as to vary the rights of third parties. (*Bank of North America vs. Meredith*, 2 Wash. C. C., 47; *United States vs. Nicholl*, 12 Wheat., 505.)

It would be a fair presumption that the sureties, then clerks in the post office, knew of and assented to the payment of the draft at the time and in the manner alleged, and that they are, therefore, estopped from now objecting to the appropriation made by the Auditor.

No law charged the Sixth Auditor or Postmaster-General with a duty to inquire as to the source from which the money came. It would be utterly impracticable to manage the Post-Office Department under a rule exacting any such duty. These officers cannot presume that a postmaster, in making a payment, is misappropriating money. Each bond of Postmaster Martin was "conditioned for the faithful discharge of all duties and trusts imposed on him." It was his duty to pay the balance found due in the settlement of his account by the Auditor, and *on the day* when demand by draft was made on him. (Rev. Stats., 292, 3624, 5495; Brandt on Suretyship, p. 636, secs. 496, 497; Scofield *vs.* Churchill, 72 N. Y., 565.)

The sureties on a second bond are liable for moneys received by the principal from a predecessor in office. (Broome *vs.* United States, 15 How., 143.)

2. The account is not stated nor the balance certified against the sureties but against the late postmaster. The balance certified by the Sixth Auditor is not, however, conclusive against them. (Lowry *vs.* The State, 64 Ind., 427; United States *vs.* Girault, 11 How., 22; United States *vs.* Boyd, 5 How., 29; United States *vs.* Eckford's Executors, 1 How., 250; Scofield *vs.* Churchill, *ubi supra*; Gandolfo *vs.* Walker, 15 Ohio St., 251, 278; Shroyer *vs.* Richmond & Staley, 16 Ohio St., 455; Stovall *vs.* Banks, 10 Wall, 583; Ammons *vs.* The People, 11 Ill., 6; Todd *vs.* Lewis, 2 Handy, Sup. Ct. Cincinnati., 280; McKellar *vs.* Bowell & Campbell, 4 Hawks, N. C., 34; The State *vs.* Colerick, 3 Ohio, 487; Kelly *vs.* The State, 25 Ohio St., 567; McCrory *vs.* Parks, 18 Ohio St., 18; McLaughlin *vs.* McLaughlin, 4 Ohio St., 508; Woodmancie *vs.* Woodmancie, 32 Ohio St., 18; Ennis *vs.* Smith, 14 How., 400; Hayes *vs.* Seaver, 7 Greenl. Maine, 237; Lipscomb *vs.* Postell, 38 Miss., 476; Gray *vs.* Jenkins, 24 Ala., N. S., 516.)

The sureties are not generally estopped from proving the official reports of the principal erroneous or false. (1 Greenl. Ev., § 187; United States *vs.* Boyd, 5 How., 29; Bissell *vs.* Saxton, 66 N. Y., 55; Erickson *vs.* Smith, 38 How. Pr., 454, 467; Baker *vs.* McDuffie, 23 Wendell, 292; Fake *vs.* Whipple, 39 N. Y., 398; Browning *vs.* Hanford, 7 Hill, N. Y., 120; Townsend *vs.* Everett, 4 Ala., N. S., 612; Pendleton and Sureties *vs.* The Bank of Kentucky, 1 Mon., 171; Ohning *vs.* The City of Evansville, 66 Ind., 59.)

The liability of the sureties on an official bond is inquired into in a suit on the bond. It is then a question for the courts to determine the nature and extent of such liability.

The account under consideration is correctly stated as against the postmaster; and, being so, it sustains the action of the Sixth Auditor.

He cannot now revoke the credit for the payment of the \$896.24 and transfer it to the liability of the postmaster accruing after January 1, 1878, because it has been lawfully appropriated to a previous liability.

3. So far as the sureties are concerned, the question of the application of credits must be left to arise in a suit on the bond, since they have no right of appeal to the First Comptroller.

The action of the Sixth Auditor must be sustained, even if it should be necessary for that purpose to decide that it was correct as between the United States and the sureties.

a. It has already been shown that if the Postmaster-General and Sixth Auditor did not know the source from which the money came, the credit, as given, must stand, because it was made in good faith.

b. But if the Postmaster-General and Sixth Auditor knew the source from which the money came, it would not change the result.

The Revised Statutes provide that—

“SEC. 3835. Whenever any postmaster is required to execute a new bond, all payments made by him after the execution of such new bond may, if the Postmaster-General or the Sixth Auditor deem it just, be applied first to discharge any balance which may be due from such postmaster under his old bond.” (Act June 8, 1872, sec. 60; 17 Stats., 292.)

This expressly authorized the appropriation made by the Auditor of the payment, without reference to the question as to whether the money was collected by the postmaster before or after the last bond became operative. It contemplates the use of postal revenues which accrue after the execution of a new bond for paying previous liabilities, and gives notice to the sureties in the new bond of the character of the liability they are about to assume.

The statute changes the rule of the common law. (Brandt on Suretyship, sec. 462.) Under its provision the debtor has no right to direct the application of payments; this is taken from him and given to the Postmaster-General and Sixth Auditor. (*Mills vs. Fowkes*, 5 Bing, N. Cas., 455; *Cremer vs. Higginson*, 1 Mason, C. C., 338; *Franklin Bank vs. Cooper*, 36 Maine, 221; *Mayor, &c., of Alexandria vs. Patten*, 4 Cranch, 317, 320; *Peters vs. Anderson*, 5 Taunt., 596; *Brazier vs. Bryant*, 2 Dowl. P. C., 477; *Chitty vs. Naish*, *Id.*, 511; *United States vs. Linn*, 2 McLean, 501.)

This statute seems to have been passed in order to meet difficulties presented by adjudicated cases.

In the case of money accounts, where there were two sets of sureties, it has been held that where balances are adjusted merely to make rests, the law will apply payment to extinguish the debts according to the

priority of time. (*United States vs. Kirkpatrick*, 9 Wheat., 720, decided in 1824.)

In *United States vs. Linn*, (2 McLean, 503, decided in 1841,) it was held, in the case of two sets of sureties for an officer in two terms of office, that the Government had *no right* to apply money received and paid over by the officer subsequently to the execution of his second bond, in discharge of a sum due by him prior to the date of that bond; and that, where different sets of sureties are concerned, the Government has no right to make such an application of payments as would work injustice to the sureties. (*United States vs. January and Patterson*, 7 Cr., 575. See Justice Story's note, *United States vs. Wardwell et al.*, 5 Mas. C. C., 87.)

In *United States vs. Eckford's Executors*, (1 Howard, 250, decided in 1843,) where there were two sets of sureties on bonds given for different terms of office, it was held that payments into the Treasury of moneys accruing and received in the second term could not lawfully be applied by the Government or the court to the extinguishment of a balance apparently due at the end of the first term. It is not said that the debtor may not make such application as he may choose. Whether he will be permitted to do so where it would work injustice to sureties—the Government knowing the facts—is not stated. The ordinary principles of justice would, in such case, doubtless control, in the absence of statutory provisions restraining or modifying them on grounds of public policy and convenience. But, if moneys received under the second bond are applied by the principal, not as required by such bond and by the law, but in satisfaction of a prior liability, this would of itself be a breach of the second bond, for which the sureties would be liable.

There is no principle on which it can be held that the failure of the principal on an official bond to comply with the law, can enure to the benefit of his sureties. The provisions of law making the postmaster's bond responsible for a neglect to pay over moneys received, and for which he is chargeable under his bond, so as to be credited in the account under that bond, was not designed for the benefit of the sureties, but for the protection of the Government against fraud.

The cases above cited, of which the dates are given, were decided upon a *principle* of construction as to the *effect of the words of the official bonds*. It was held substantially that when a surety executes a bond "conditioned for the faithful discharge of all duties and trusts"—or equivalent words—his contract, as applied to public money received by the principal, is, that it shall be duly paid over to the proper officers of the Government; and that to hold a surety liable after this has been

done would be to alter the contract. (*United States vs. Linn*, 2 McLean, 507; Rev. Stats., 5495.)

Every person is presumed to know the legal effect of his contract. (*Lewis vs. Jones*, 4 Barn. & C., 512; *Platt vs. Scott*, 6 Blackf., 390; *Mears vs. Graham*, 8 Blackf., 145; *Minor vs. The Mechanics' Bank of Alexandria*, 1 Pet., 73.)

Three points are considered in the enactment as well as in the construction of remedial statutes—the old law, the mischief, and the remedy. The legislature could not pass remedial statutes if it were ignorant of the construction given in the decisions of the courts to the law of the land; hence the enactment of such legislation is *ipso facto* conclusive evidence of a knowledge by the legislature, not only of the old law, but of these decisions and of the existence of a mischief to be remedied. Congress, being well aware of the construction placed upon official bonds by the courts—namely, that there was under existing law no authority to settle the account of a postmaster under one official bond by the appropriation to it of public moneys collected under a subsequent bond for which the sureties on the latter were liable, whether different or not from those on the prior bond—regarded the want of authority indicated thereby as a mischief to be remedied, and therefore enacted the statute of June 8, 1872, section 60, (Rev. Stats., 3835,) which authorized either the Postmaster-General or the Sixth Auditor to apply, if deemed just, all payments made by a postmaster after the execution of a new bond to the discharge of any balance due under the old bond.

Though the form of postmasters' bonds remains the same as it was before this enactment, the statute changed the legal meaning and effect of the contract of the sureties on bonds to be executed after its enactment. Congress has undoubtedly the power to prescribe the extent of the liability of sureties on official bonds. When, as in this case, this is done, sureties cannot plead ignorance of the law, or of its effect on their contract of suretyship. In such case, it could with strict justice be held that *Ignorantia juris non excusat*.

It is laid down in the case of the *United States vs. Hawkins*, (10 Pet., 133,) that all the provisions of a statute regulating the institution of suits and the recovery by judgment of unpaid balances from delinquent officers, "*are as much a part of their bonds as if they were recited in them.*" (2 Parsons, Cont., 6th ed., 536, [683;] 1 Greenl. Ev., 7th ed., 293, 294; *Uhde vs. Walters*, 3 Camp. N. P., 16; *Robertson vs. Money, Ryan & M.*, 75; *Robertson vs. Clarke*, 1 Bing., 445; *Fowler vs. Smith*, 2 Cal., 568; *Rindskoff Bros. vs. Barrett*, 14 Iowa, 101; *Forgay vs. Ferguson*, 6 La. Ann., 770.) "The obligation of a contract consists in

its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other." (*McCracken vs. Hayward*, 2 How., 612.) "A contract is not merely that which the parties expressly stipulate. It is that, also, which the existing laws of the country where the contract is made annex as conditions to it at the time when it was formed." (*Ogden vs. Saunders*, 12 Wheat., 231.) "These conditions enter into the contract, and form a part of it as completely as if they had been expressly stipulated by the parties themselves." (*Id.*)

The apparent conflict in the decisions of courts as to the construction of official bonds may often be reconciled by observing (1) the dissimilarity in the phraseology of the different bonds, and (2) the effect of statutes as applied to them. The case of *Scofield vs. Churchill* (72 N. Y., 565) well illustrates the importance of these points.*

If this were a valid appeal, the decision of the Comptroller would, in any view of the matter objected to by the sureties, be in support of the action of the Auditor for the Post-Office Department.

TREASURY DEPARTMENT,

First Comptroller's Office, June 28, 1881.

*It is a general rule that the sureties in an official bond, conditioned for the faithful discharge of the duties of an officer, are not liable for defalcations or misappropriations of money made prior to the taking effect of the bond; and this rule applies in cases where an officer gives a *new bond* during his term of office, or a second bond for a second term. That new sureties are not responsible for prior defalcations, unless the conditions of the new obligations embrace such defalcations, is a principle which has frequently been laid down in the decisions of courts. (*Brandt on Suretyship*, 462; *Fell's Law of Sureties*, 122, chap. 5; *United States vs. January & Patterson*, 7 Cr., 575; *Farrar vs. United States*, 5 Pet., 373; *United States vs. Boyd*, 15 Pet., 187; *United States vs. Lynn*, 1 How., 104; *Postmaster-General vs. Norvell*, Gilpin, 106; *Myers vs. United States*, 1 McLean, 493; *United States vs. Spencer*, 2 McL., 405; *County Mahaska vs. Ingalls*, 16 Iowa, 81; *Bessinger vs. Dickman*, 20 Iowa, 261; *Townsend vs. Everett*, 4 Ala., 607; *Bissell vs. Saxton*, 66 N. Y., 55; *Rochester vs. Randall*, 105 Mass., 295; *Vivian vs. Otis*, 24 Wis., 518; *Sanders vs. State*, 49 Ind., 223; *State vs. Sanders*, 62 Ind., 562; *State vs. Page*, 63 Ind., 209; *Lowery vs. The State*, 64 Ind., 426; *Hipes vs. The State*, 69 Ind., 403.)

The general rule referred to does not apply (1) where the bond is given under a statute which makes the sureties liable for all sums finally found due, without reference to the time when the liability accrued; nor (2) under a valid bond by the terms of which the sureties bind themselves to such liability; as, *e. g.*, in a bond conditioned to obey all orders of a court authorized to order payments. (*Scofield vs. Churchill*, 72 N. Y., 565; *Armstrong vs. The State*, 7 Blackf., 81; *State vs. Sanders*, 62 Ind., 562; *Lowery vs. The State*, 64 Ind., 421; *Hipes vs. The State*, 69 Ind., 403; *Baggott vs. Boulger*, 2 Duer, 160; *Gottsberger vs. Taylor*, 19 N. Y., 150; *Saunders vs. Taylor*, 9 Barn. & C., 35; *Choate vs. Arrington*, 116 Mass., 552; *Treasurer vs. Taylor*, 2 Bailey, S. C. Law, 524; *Erricks vs. Powell*, 2 Strobb. Eq., 196; *Ammons vs. The People*, 11 Ill., 6; *Kelly vs. The State*, 25 Ohio St., 577; *Case vs. The State*, 10 West. Law Jour., 163; *Merrells vs. Phelps*, 34 Conn., 109; *Bryant vs. Owen*, 1 Georgia, 355; *Commonwealth vs. Cox's Adm'r*, 36 Pa. St., 442; *Brandt on Suretyship*, § 496-7; 3 *Waite's Actions and Defenses*, 538, 540, 575; *Schofield vs. Hustis*, 16 N. Y. Sup. Ct., 157; *Stovall vs. Banks*, 10 Wall., 583; *Lucas vs. Curry's Ex'rs*, 2 Bailey, S. C. Law, 403; *Hobbs & Churchill vs. Middleton*, 1 J. J. Marsh., 176; *Taylor vs.*

Hunt's Ex'rs, 34 Mo., 205; Ordinary vs. Kershaw, 1 McCarter, N. J., 527; Ralston vs. Wood, 15 Ill., 159; Pinkstaff vs. The People, 59 Ill., 148; Commonwealth vs. Rhoades, 37 Pa. St., 60; Bissell vs. Saxton, 66 N. Y., 55; Steele vs. Reese & Smith, 6 Yerg., 263; Bell's Adm'r vs. Jasper, 2 Ired. Eq., 597.)

When during the term of his office the incumbent gives a new and additional bond, the general rule is that the sureties on that and his former bond are equally liable for defaults occurring after the second bond is given; and in such case, there is, it would seem, in equity, a right of contribution between the two sets of sureties. (Brandt on Suretyship, sec. 463; Postmaster-General vs. Reeder, 4 Wash. C. C., 686; Postmaster-General vs. Munger, 2 Paine, C. C., 189, 196; United States vs. Nicholl, 12 Wheat., 505, 509; State vs. Crooks, 7 Ohio (Part 2,) 221; Loring vs. Bacon, 3 Cushing, 466; Choate vs. Arrington, 116 Mass., 552; Moore vs. Boudinot, 64 N. C., 190; Poole vs. Cox, 9 Ired., 69; Bell vs. Jasper, 2 Ired. Eq., 597; Oates vs. Bryan, 3 Dev., 451; Reno vs. Tyson, 24 Ind., 56; Boyd vs. Gault, 3 Bush, Ky., 644; McMath vs. State, 6 Harr. & J., 98; Harrison vs. Lane, 5 Leigh, Va., 414; Glenn vs. Wallace, 4 Strobb. Eq., 149; Corprew vs. Boyle, 24 Gratt., Va., 284; Lalla Bunseeder vs. Bengal Government, 14 Moore's Indian Appeals, 86; Craythorne vs. Swinburne, 14 Ves., 160; Deering vs. Earl of Winchelsea, 1 Cox, 308; Morris vs. Morris, 9 Heisk., Tenn., 814; Schofield vs. Hustis, 16 N. Y. Sup. Ct., 157; State vs. Paul's Ex'rs, 21 Mo., 51; State vs. Drury, 36 Mo., 281.)

There may, however, be a statutory exception to this rule; e. g., section 2 of the act of March 1, 1879, (20 Stats., 327,) amendatory of section 3143 of the Revised Statutes, provides, in respect of new bonds to be executed by a collector of internal revenue during his term of office, that the "new bond shall be in lieu of any former bond or bonds of such collector in respect to all liabilities accruing after the date of its approval by the Solicitor of the Treasury." (United States vs. Wardwell *et al.*, 5 Mas. C. C., 85.)

It is a general rule that when an officer is reappointed or re-elected for a second or other subsequent term of office, and bonds are given in pursuance of a requirement of law for each term, the sureties on each bond are liable only for defaults occurring in the term for which it was given. This is the effect of the contract in bonds, with conditions in the usual form. (Brandt on Suretyship, 464; Street vs. Laurens, 5 Rich. Eq., S. C., 227; S. C. Society vs. Johnson, 1 McCord, 41; Commissioner vs. Greenwood, 1 Desaus. Eq., 450; South Carolina Ins. Co. vs. Smith, 2 Hill, 589; State vs. McCormick, 50 Mo., 568; Draffen vs. Boonville, 8 Id., 395; Todd vs. Boone Co., Id., 431; State vs. Smith, 26 Id., 226; Smith vs. Paul, 21 Id., 51; Drury vs. Drury, 36 Id., 281; State vs. Atherton, 40 Id., 209; County of Wapello vs. Bingham, 10 Iowa, 39; People vs. Aikenhead, 5 Cal., 106; Dumas vs. Patterson, 9 Ala., 484; State vs. Vananda, 7 Blackf., 214; Ham vs. State, Id., 314.)

IN THE MATTER OF THE AUTHORITY OF THE DISTRICT COMMISSIONERS TO PURCHASE SITES FOR POLICE-STATION HOUSES IN WASHINGTON.—POLICE-STATION CASE.

1. It is a *general* rule that when a power is given by a statute, everything necessary to the making of it effectual is given by implication.
2. Among the cases of the application of this rule are these: A power to *construct* a *dam* across a stream carries with it authority to purchase necessary real estate; a power to *sell* carries with it authority to *make a deed of conveyance*.
3. This general rule does not apply, when it is apparent from the words employed in a statute, or from extrinsic facts, of which the law-making power is presumed to be cognizant, that the legislative intent was otherwise.
4. The meaning of a particular phrase in a statute may be ascertained by comparing it with the terms employed on a kindred subject in another phrase.
5. An illustration of the application of this rule is found in the act of Congress of March 3, 1881, (21 Stats., 467,) in which the Commissioners of the District of Columbia are authorized, in section third, to sell lots in Washington and apply the proceeds of sale "to the erection and furnishing of two new police-station houses;" and to sell lots in Georgetown and apply the proceeds of sale "to the *purchase of a lot* and the erection and furnishing of a new engine-house."
6. In view of the language of this section, and of the fact that Congress may be presumed to have known that the United States and the District of Columbia owned sundry lots in Washington, there is no *implied* power to *purchase sites* for the police-station houses in Washington.
7. It is a general rule that a statute should, if its language will reasonably admit of it, be so construed as to make it operative, rather than fail of its purpose.
8. But this rule must yield to the *intention* of Congress, as expressed in an act, or deducible from its language by other approved rules of construction.
9. Implied powers are not to be deduced from a statute against its plain words, or against well-settled rules of construction applicable thereto.

The act of Congress of March 3, 1881, making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1882, and for other purposes, (21 Stats., 458, 467,) contains this provision:

"SEC. 3. That the Commissioners of the District of Columbia be, and they are hereby, authorized and empowered to sell to the highest bidder, at public auction, the following-named property belonging to the said District of Columbia in Washington City: Lot three, square three hundred and eighty-two; part of lot three, square four hundred and ninety; and also the following-named property in the city of Georgetown belonging to said District: Fish-wharf on square six; part of lots forty-seven, forty-eight, and forty-nine in square thirty; and part of lot two hundred and forty-five in square ninety-nine: *Provided*, That * * * the proceeds of the sale of the said lots situate in Washington shall be applied to the erection and furnishing of two new police-station houses in Washington; and the proceeds of the sale of

the said lots situate in Georgetown, or so much thereof as may be necessary, shall be applied to the *purchase of a lot* and the erection and furnishing of a new engine-house for engine company number five of the District of Columbia fire department, at present located in said city of Georgetown.”

Section 6 authorizes the sale of the right, title, and interest of the *United States* in and to a certain parcel of land in the city of Washington, and the use of the proceeds for the same purposes mentioned in section 3.

The Commissioners of the District addressed, May 27, 1881, a letter to the First Comptroller, in which they ask him to decide whether they are authorized to *purchase sites* on which to erect the new police-station houses provided for in the section above quoted. They say:

“The Commissioners do not overlook the fact that express authority is given for the purchase of *a lot* in the case of the erection and furnishing of the fire-engine house, * * * and that such authority is not given for the purchase of lots for the police-station houses. But this difference in the two cases may, they think, be accounted for by the fact that the lot on which the Georgetown engine-house is *now located* is one of the lots which the Commissioners are authorized to sell.”

—

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

If the act of March 3, 1881, had given authority to the Commissioners simply to *erect new police-station houses*, and appropriated money for the purpose, there would have been an *implied authority* to purchase the land necessary for the purpose. This construction would accord with the rule laid down by Sir F. Dwarries, that—

“In statutes, *incidents* are always supplied by intendment; in other words, whenever a power is given by a statute, everything necessary to the making of it effectual, is given by implication; for the maxim is *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud*. (Potter’s Dwarries, Stats. and Const., 123; 2 Inst., 306; 12 Rep., 130, 131; Sedgwick, Stat. and Const. L., 2d ed., 228, *n.*; Green *vs.* Mayor and City of New York, 2 Hilton, 203; Johnson *vs.* Joliet & C. R. R. Co., 33 Ill., 202; State *vs.* Donehey, 8 Clarke, Iowa, 396; Thomasson *vs.* State, 15 Ind., 449; Opinion of Justices Sup. Jud. Ct., 41 N. H., 553.) And again: *Ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*.” (Broom, Legal Max., 483; The Clarence R. Co. *vs.* Great N. E. R. & J. R. Co., 13 Mees. & W. Exch., 706.)

Illustrations of the application of the principle upon which this rule is based are very numerous. Thus it has been held that the act of March 3, 1875, chapter 134, which authorized the construction of a movable dam, gave, impliedly, authority for the purchase of the necessary land on which to erect it. (15 Op. Att.-Gen., 212.) So a power to sell land carries with it an implied power to make a conveyance.

(Opinion of the Attorney-General of May 18, 1881; Story on Sales, 70; Decker *vs.* Freeman, 3 Greenl., 338; Valentine *vs.* Piper, 22 Pick., 85.)

In Yale *vs.* Eames, 1 Met., 488, it was held that authority to sell a note included the power to indorse, Shaw, C. J., saying: "It comes within the reason and spirit of the rule, that an authority to sell real estate vests the attorney with power to execute such deeds as will effectually vest the estate in the vendee, entering into no new or special covenants." See, also, the Revised Statutes of the United States, section 3749; Birch's case, 1 Lawrence, Compt. Dec., 154; Inspectors' case, *Id.*, 201; Bender's case, *Id.*, 317; Eveleth's case, *ante*, 22.

The rule of construction which supplies incidents by intendment is, however, not applicable to the section of the statute to which reference has been made. No authority can be implied from its provisions for the purchase of *sites* for new police station-houses, because such intendment is rebutted (1) by the terms of the act itself, and (2) by the express appropriation to *other uses* of *all* the money to be derived from the sale of the lands.

1. The act authorizes a sale of lots in Georgetown and in Washington; as to Georgetown, it says the proceeds of the sale "shall be applied to the *purchase of a lot* and the erection * * * of a new engine-house;" as to Washington, it says the proceeds of sale "shall be applied to the erection and furnishing of two new police-station houses." In one case, a *purchase of land* is expressly authorized; in the other, *it is not*. The case submitted is one in which the intention of Congress as to Washington is to be ascertained by what is said in reference to a similar case as to Georgetown. This method is in accordance with the principle that "in the construction of a statute every *part of it* must be viewed in *connection with the whole*, so as to make all its parts harmonize, if practicable, and give a *sensible* and intelligent *effect to each*." (Potter's Dwaris, Stats. and Const., 144.) "The intention * * * is to be deduced from a view of the whole and of *every part* of a statute taken and *compared together*." (1 Kent, Com., 462; Co. Litt., 381 *a*; Broom, Leg. Max., 585.) "The different parts reflect light on each other, and, *if possible*, such a construction is to be made as will *avoid any contradiction* or inconsistency." (Sedgwick, Stat. and Const. L., 200; The Commonwealth *vs.* Duane, 1 Binn., 601.)

The maxim *Noscitur à sociis* requires words and expressions to be construed with reference to the sense applied to similar words in the same connection. (Sedgwick, Stat. and Const. L., 220; Broom, Leg. Max., 288.) There is a kindred maxim, *Copulatio verborum indicat acceptationem in eodem sensu*. (4 Bacon's Works, 26.) Broom says the

meaning of a "particular expression * * * may frequently be ascertained * * * by looking at the *adjoining words*." "The sages of the law have been used to collect the meaning and sense of the law by *comparing one part with another*; * * * and not of *one part only by itself*—*nemo enim aliquam partem recte intelligere possit, antiquam totum iterum atque iterum, per legerit.*" (Lincoln College's case, 3 Co., 59*b*; *Stradling vs. Morgan*, Plowd., 205; Co. Litt., 381*a*; *Broom, Leg. Max.*, 593; *Shawhan vs. Wherritt*, 7 How., 637; *Sharp vs. Sharp*, 2 B. & Ald., 405; *Hill on Trustees*, 179.) The rules of construction require general words and incidents by intendment to be restrained where such purpose is apparent in the statute. (*Broom, Leg. Max.*, 646; *Bac. Max. Reg.*, 10; 6 Rep., 62.)

In view of these maxims, rules, and principles, the words which authorize "the erection and furnishing of two new police-station houses in Washington" are, by reference to the words authorizing "the purchase of a lot and the erection of a new engine-house" in Georgetown, and in view of extrinsic facts hereafter stated, so far restrained that the incident of implied power to purchase a lot or lots for the station-houses, which would otherwise arise by intendment, cannot in this case be considered as having been intended by Congress.

2. This conclusion is strengthened by the fact that the statute requires *all* the proceeds of the lots sold to be applied "to the erection and furnishing two new police-station houses" as to Washington; while, as to Georgetown, it is expressly provided that a *part* of the proceeds of sales shall be applied in the purchase of a lot, and a part in erecting and furnishing a new engine-house.

If in this case the purpose of the statute as to the erection of new station-houses for Washington on *any* location would be defeated by the denial of an incidental authority by intendment to purchase sites therefor, a different question would be presented, which is not necessary now to decide. A statute should, if reasonably practicable, be construed in such manner that it may be executed; *ut res magis valeat quam pereat*; unless, indeed, it is apparent or probable that the law-making power could not, or did not, foresee or know of the cause operating to prevent its execution. (*Sedgwick, Stat. and Const. L.*, 226; *People vs. King*, 28 Cal., 265; *United States vs. Stern*, 5 Blatchf. C. C., 512; *Nichols vs. Halliday*, 27 Wis., 406; *Commonwealth vs. Westchester, &c., R. R.*, 3 Grant's Pa. Cas., 200.)

Construction should generally seek to avoid a *casus omissus*. (*Broom, Leg. Max.*, 46, 83.)

But this rule has no application here; and even a clear *casus omissus* gives no authority "to make laws." (*Jones vs. Smart*, 1 Term R., 52.)

It cannot be said here, in aid of the implied authority to purchase lots, either that the act is *absolutely* inoperative without it, or that Congress actually or probably did foresee or know that it would be so. The question how far extrinsic facts can give construction to statutes opens an ample field for discussion. (Sedgwick, Stat. and Const. L., 202; 1 Greenl. Ev., 5, 6; Bank of Augusta *vs.* Earle, 13 Pet., 590; 1 Stark. Ev., 6th Am. ed., 211.)

The government of the District of Columbia is under the authority and supervision of Congress. The United States owns the streets, avenues, parks, and many lots of land in Washington, with public buildings thereon, some with large, open unoccupied spaces, besides a few vacant lots, and others used for the purposes of the District of Columbia. Over these the Commissioners of the District exercise a large authority. And the District also owns a few vacant lots.* (Act of June 11, 1878; 20 Stats., 102, 104.)

All this is proper matter of legislative cognizance; it must be presumed to have been known to Congress when it passed the act of March 3, 1881.

The usual rule, therefore, that a statute is generally to be construed so as to be operative rather than fail of its purpose, if the words employed will reasonably admit of it, cannot supply implied powers when Congress has shown a purpose to deny them. Among a people jealous of their liberties, in which law is a safeguard to be respected, and legislative authority not to be disregarded or usurped by the executive or judicial departments, the only safe rule is to act upon what Congress has said, and not to supply an intention contrary thereto. If it be even surmised that Congress *may* have intended to give an implied power, it is safer to say of that body, *Quod voluit non dixit; Optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi.* (Broom, Leg. Max., 83, 84; Bacon's Aphorisms, 46.) *Discretio est discernere per legem quid sit justum.* (4 Inst., 41.)

If it should happen that the United States or the District of Columbia does not own any site in a *suitable locality*, this could not change the result. In view of the phraseology of the statute, and the fact that the United States and the District of Columbia own numerous lots in Washington, the intention of Congress not to give authority to purchase sites is clear.

The consideration that "the lot on which the Georgetown engine-house is now located is one of the lots which the Commissioners are authorized to sell," cannot change the result. That fact would render it

* See foot-note on page 343, *post*.

all the more *unnecessary* to give *express* authority to purchase a lot, since the occasion for *implying* an authority was by the sale so much the more necessary.

Implied powers are not to be deduced from a statute against its plain words, or against well-settled rules of construction. This results as a necessity of reserving to Congress all law-making power.

The Commissioners of the District of Columbia have no authority under the act of March 3, 1881, to purchase any site for the erection of a new police-station house.

TREASURY DEPARTMENT,
First Comptroller's Office, June 29, 1881.

NOTE, (*ante*, 342.)—The United States owns the following *vacant* lots:

Square.	Lot.	Square feet.	Location.
82	All	10,610	E st. north, Virginia ave. and 21st st. west.
636	Of 11 and 12...	11,442	B st. south, bet. Del. ave. and So. Capitol st.
836	12.....	4,200	SW. corner of Sixth and E streets, NE.
985	1, 2, 18	14,010	NW. corner of 12th and D streets, NE.

The District of Columbia owns the following *vacant* lots:

Square.	Lot.	Square feet.	Location.
490	Of 3	4,272	C st., bet. 4½ and Sixth streets, NW.
792	Of 5	4,000	NE. corner of Third and D streets, SE.
925	Of 6	2,400	Eighth st., between D and E streets, SE.
372	Subs. 1 and 17.	3,020	Ninth st., bet. New York ave. and K st., NW.

IN THE MATTER OF THE AUTHORITY OF RECEIVERS OF PUBLIC MONEYS TO REFUND THE EXCESS-PURCHASE MONEY OF PUBLIC LANDS ON ENTRY MADE UNDER THE GRADUATION ACT.—EXCESS-REFUND CASE.

1. Construction given to the graduation act of August 4, 1854, (10 Stats., 574;) to the act of March 3, 1855, (10 Stats., 649;) and to sections 3617, 5596, and 5597 of the Revised Statutes.
2. That portion of the act of March 3, 1855, (10 Stats., 649,) which authorizes "receivers of public money for the proper land district to refund the excess" of purchase-money paid under the graduation act "out of any money" in the hands of such receivers "derived from the sales of public lands," is not repealed by section 3617 of the Revised Statutes, but is in force.
3. The Revised Statutes deal only with statutes which are (1) "general and permanent in their nature," and (2) in force on the 1st day of December, 1873. Hence all statutes in force on December 1, 1873, which are not "general and permanent in their nature," are to have effect precisely as if the revision had not been enacted by Congress.
4. This provision is contained in section 5596 of the Revised Statutes.
5. Whether a general and permanent provision in a statute, of which statute a portion has been embraced in the revision, and which has been omitted by *oversight* from the Revised Statutes, can be regarded as in force—*quare?*
6. All claims for a refund of excess purchase-money under the graduation act, which has been repealed, are saved by section 5597 of the Revised Statutes.
7. Receivers of public money have authority by virtue of the act of March 3, 1855, (10 Stats., 649,) under proper instructions and regulations; to make a refund of excess purchase-money paid on entries made under the "graduation act," notwithstanding the provision of section 3617 of the Revised Statutes.

March 29, 1881, the Secretary of the Treasury addressed to the First Comptroller a letter stating that it is the custom of the receiver of public moneys at the local land office at Camden, Arkansas, to refund from current receipts on account of sales of public lands "excess payments" made under the "graduation act" of August 4, 1854, (10 Stats., 574,) and to deduct the amount of such payments from the receipts reported in his statements of moneys received and deposited, rendered monthly to the Secretary of the Treasury. The Secretary asks an expression of opinion from the Comptroller as to whether the receivers have the right to make such deductions.

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

Section 3617 of the Revised Statutes provides that—

"The gross amount of all moneys received from whatever source for the use of the United States, * * * shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as prac-

licable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claims of any description whatever."

It is clear that, if this section is applicable to receivers of public moneys, they must pay all moneys received by them into the Treasury, and hence cannot use any part of it in refunding "excess" purchase-money paid by persons having made entries of land under the "graduation act" of August 4, 1854. (10 Stats., 574.)

The questions to be considered, therefore, are :

1. Were the receivers at any time authorized by statute to make a refund of such excess purchase-money ?

2. If so, is the statute, giving such authority, still in force ?

I.—The receivers *were* authorized by statute to make a refund of excess purchase-money. The act of Congress of August 4, 1854, (10 Stats., 574,) known as the "graduation act," reduced the price of certain portions of the public lands from \$1.25 to \$1, seventy-five cents, fifty cents, twenty-five cents, and twelve-and-a-half cents per acre, respectively.

The act of March 3, 1855 (10 Stats., 643, 649,) provided that, in cases where lands had been sold under the "graduation act" at a higher rate than prescribed by that act, the Secretary of the Interior was "authorized to direct the receiver[s] of public money for the proper land districts to refund the excess out of any money in his hands derived from the sales of public lands." Here, then, is the statutory authority for receivers to make a refund of excess purchase-money.

II.—This authority of the receivers of public money to refund the excess purchase-money continues in force.

Section 3617 of the Revised Statutes is the provision which apparently imposes a prohibition on refunding by receivers of public money. This section is a re-enactment of the acts of March 3, 1849, (9 Stats., 398,) and September 28, 1850, (*Id.*, 507.) The refunding was authorized by the act of March 3, 1855, (10 Stats., 649.)

If there had been no revision of the statutes, and the law should be determined upon these acts—the act of 1855 authorizing a refund being later in date than the acts of 1849 and 1850 (now Rev. Stats., 3617)—the refunding would be clearly authorized. The earlier acts must yield to the later act relative to refunding.

That portion of the act of March 3, 1855, (10 Stats., 649,) which authorizes the refund by receivers of public money, is not repealed.

The Revised Statutes were prepared by commissioners under the act of June 27, 1866, (14 Stats., 74,) which required them "to revise, simplify, arrange, and consolidate all statutes of the United States, gen-

eral and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings." The statutes so revised were, June 22, 1874, enacted by Congress; and were declared to embrace the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, 1873. (Rev. Stats., 5595.)

It will thus be seen that Congress and the commissioners divided the statutes into three general classes: (1) those "general and permanent in their nature;" (2) all others in force December 1, 1873; and (3) those which, in their opinion, were repealed, suspended, or obsolete, and so not "in force." The last two classes are not included in the revision.

The unrevised statutes in force include many which are general in their nature, though not permanent; and many which are permanent in their nature, but not general.

As the revision only deals with statutes "general and permanent in their nature," it follows as a logical deduction that all statutes not thus general and permanent are to have effect precisely as if the revision had not been adopted.

It is pertinent to inquire, therefore, not simply whether the "graduation act," and the ancillary provision as to refunds by receivers of public money, in the act of March 3, 1855, (10 Stats., 649,) are "general and permanent in their nature," but also whether they have been so regarded in the revision, and to what extent they are in force.

The graduation act was repealed by the act of June 2, 1862, (12 Stats., 413,) and hence no portion of it is included in the revision. The commissioners in preparing and Congress in enacting the revision, necessarily regarded the graduation act as not to be included therein. The particular provision above cited, authorizing the receivers of public money to refund excess payments, is not incorporated into the Revised Statutes.

Inasmuch as it relates to refunds only under the graduation act, which has been repealed, it is necessarily not permanent in its nature, even if it could once have been regarded as general; and hence could not be included in the revision.

As the Revised Statutes do not deal with or affect earlier statutes, which are not permanent in their nature, and as the provision now under consideration is not permanent, this provision remains in force.

The same result follows from the repealing provision of the revision, as follows:

"SEC. 5596. All acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, any portion

of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided*, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment."

This section recognizes the three classes of statutes to which reference has been made, and declares in effect that when "any portion" of a general and permanent statute is embraced in any section of the revision, all other parts not so embraced fall within one or the other of three classes of provisions, to wit: (1) statutes which are general and permanent in their nature; (2) statutes which are not general or permanent in their nature, but still in force; (3) statutes which are not in force. The last of these three classes is omitted from the revision, because the statutes included in it are repealed, obsolete, or superseded, and hence not in force.

The second class is omitted, not because the statutes are not in force, but only because they are not "permanent in their nature." To this class belongs the provision for refund, now under consideration.

The first class is included, because the statutes are general and permanent in their nature.

The authority of receivers to refund excess purchase-money paid on entries under the graduation act is not affected by the fact that portions of the act of March 3, 1855, chapter 175, (10 Stat., 643,) have been incorporated into sections 163, 164, 176, 201, 823, 1883, 2051, 2209, 2578, 3596, 3662, 3663, 3664, and 3763 of the Revised Statutes. But the omitted portion as to refund of excess purchase-money by receivers was, as already shown, deemed by Congress not permanent, and therefore is not included in the revision; but it is not by reason of this omission to be considered as repealed. It stands precisely as if the revision had not been made. The commissioners were not authorized to include it in the revision.

The failure to observe the distinction between statutes (1) general and (2) permanent, and those not having both these qualities, may have resulted in some unnecessary perplexity. This failure may have sometimes led to the inquiry, whether a general and permanent provision in a statute has by oversight been omitted from the revision, and is

nevertheless to be considered in force; when the inquiry should have been as to whether the omitted provision has been deemed not general and permanent, and hence has neither been repealed in terms by section 5596, nor by the general scope or purpose of the revision. (Audit case, 1 Lawrence, Compt. Dec., 43, *note*.)

It may, perhaps, be difficult to decide whether effect is to be given to a provision omitted by oversight from the revision, when such provision is general and permanent, and is in a statute some portion of which is embraced in the revision. That question has been somewhat discussed. (United States *vs.* Jordan, 2 Lowell's Dec., 542; Audit case, *ubi sup.*)

The case of the United States *vs.* Bowen (100 U. S., 508) does not deal with this question. In view of the explicit language of the repealing section, 5596, it would seem that there are difficulties in the way of giving effect to a general provision which has been omitted by oversight from the revision. (Murdock *vs.* Memphis, 20 Wall., 617.) But it is not necessary now to enter into any further consideration of this question.*

All claims for a refund of excess purchase-money existed prior to the revision, and they are therefore saved by section 5597 of the Revised Statutes, which provides that "the repeal of the several acts embraced in said revision, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner, as if said repeal had not been made; nor shall said repeal, in any manner affect the right to any office, or change the term or tenure thereof."

The revision was designed to include the general laws in force on December 1, 1873; but it took effect at the date of its approval, June 22, 1874. All claims for a refund made prior to that date are saved; even if otherwise there could have been, by any construction, a repeal of the provision authorizing the refund. (United States *vs.* Jordan, 2 Lowell, 537; Bechtel *vs.* United States, 101 U. S., 597.)

In this connection it may be proper to observe that the allowance of claims for a refund, and the paying out of public money thereon by receivers, is an anomaly in our fiscal system, and liable to be attended with difficulties, if not serious dangers. Uniformity of action in the expenditure of the public funds is very desirable. It is always safe to

* Section 11 of the act of August 31, 1852, chapter 103, (10 Stats., 99,) was by oversight omitted from the Revised Statutes, and Congress considered it necessary to restore its provisions. (See 18 Stats., 318, amending section 846, Rev. Stats., by adding, *verbatim*, said section 11 of the act of 1852.)

require all public moneys to be paid into the Treasury, in order that the control over them by Congress and the accounting officers may be maintained unimpaired.

The conclusion is, that receivers of public money have, by virtue of the act of March 3, 1855, authority, under proper instructions and regulations, to make a refund of excess purchase-money under the graduation act, notwithstanding the requirement of section 3617 of the Revised Statutes.

TREASURY DEPARTMENT,

First Comptroller's Office, June 30, 1881.

IN THE MATTER OF THE RIGHT OF THE "ACTUAL MAKER"
OF CIGARS TO AN ALLOWANCE FOR REVENUE STAMPS
"UNNECESSARILY USED."—LEGGETT'S CASE.

1. Under the internal-revenue laws stamps are to be affixed "by the actual maker" on each box containing cigars. When more stamps are used than the law requires, the *actual maker* of the cigars so affixing the unnecessary stamps is entitled to an "allowance" therefor, on application made in due time and form.
2. When the manufacturer of cigars, having paid the license tax required by law, makes cigars for a dealer who furnishes the material and money to buy stamps, the claim for an "allowance" for stamps "unnecessarily used" should be made only by the "actual maker," and not by the dealer.
3. The claim of the actual maker of the cigars for such allowance is not assignable.
4. When cigars are packed in boxes duly stamped, and it becomes necessary to repack the cigars in new boxes, and to affix new stamps thereon, the manufacturer so affixing the new stamps is entitled to an "allowance" therefor, as for stamps "unnecessarily used." The expression "unnecessarily used," in the statute authorizing an allowance, means *used in excess* of the amount of *one* set of stamps required by law.
5. If a manufacturer affix stamps to boxes of cigars purposely arranged to be sold in violation of law, as by containing prize packages, and if the same are subsequently repacked in other boxes with new stamps by the same manufacturer, or by one who takes the cigars with a knowledge of the facts; whether there can be an "allowance" as for stamps "unnecessarily used," in such case, *quære*.

From October 1 to 16, 1878, David Beir, of New York city, having, as a manufacturer of cigars, paid the special tax required by section 3242 of the Revised Statutes, put up 194,000 of "Leggett's money-order cigars" in separate boxes, each containing 500 cigars, with a three-dollar revenue stamp on each box, as the law required. These were prepared for Leggett & Co., who paid all expenses, and for whom, it

is shown, Beir acted, he being chief clerk on an annual salary in their cigar sales establishment.

In March, 1879, Edward A. Smith, a cigar manufacturer of New York city, addressed a letter to the Commissioner of Internal Revenue, saying, "Leggett & Co. have sold a number [of packages] of these goods, and have the present lot of 150,000 on hand; they ascertained that this mode of doing business was contrary to the laws of the State, as well, I believe, as of the United States; and Mr. Leggett immediately withdrew all samples, and ordered that not another box be sold." Mr. Smith also requested "the Government to furnish the stamps for same in return for stamps now on the goods," in order that the cigars might be repacked in boxes suitable for sale.

April 1, 1879, the Commissioner of Internal Revenue, in reply, said he had no authority "to make an allowance for, or redeem the stamps affixed to, these cigars," but said, "If it is not possible to render these cigars salable without repacking them in new boxes, and furnishing, affixing, and cancelling new stamps, thus necessitating the payment of a second tax upon the same cigars, they can do so, and then *submit* a claim on Form 46 for refunding the *last one* of the taxes paid * * * as being excessive in amount. * * * Such claim would receive careful consideration, * * * though I can give no assurance that it would be allowed." (Rev. Stats., 3220.)

Between June 3, 1879, and January 12, 1880, the cigars in question were repacked in new boxes, and new stamps, amounting to \$1,138.80, were affixed thereon, and cancelled by *Edward A. Smith, as the manufacturer*, he having, as such, paid the special tax. He states by affidavit that "the repacking and restamping of said cigars has been done by Edward A. Smith, a licensed manufacturer, who conducted the business for David Beir, who manufactured for Leggett & Co., proprietors, under the * * * license of David Beir."

January 15, 1880, Beir made to Leggett & Co. a written assignment of all claims for an allowance by reason of the unnecessary stamps formerly affixed. Edward A. Smith is absent and cannot be found.

January 27, 1880, Leggett & Co. made out, on form 38, under section 3426 of the Revised Statutes, a claim for the redemption of the stamps purchased and *used*, as aforesaid, in October, 1878. This claim was presented to the Commissioner of Internal Revenue soon after March 1, 1880. The stamps first affixed to the boxes, and which were removed when the cigars were repacked, accompany the claim on form 38.

February 21, 1881, Leggett & Co. made out, under section 3220 of the Revised Statutes, another claim, which was presented, March 11,

1881, to the Commissioner of Internal Revenue for \$1,138.80, for the refunding of the cost of the stamps purchased for the repacked boxes which were used between July 1, 1879, and January 12, 1880. The claimants tender a bond to indemnify the United States against any claim made by Beir.

The papers are informally submitted to the First Comptroller for an opinion on the question as to whether the claim made under section 3426 of the Revised Statutes is one which can be lawfully allowed.

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OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

The facts stated present several points for consideration.

I.—The claimants have no such interest in, or connection with, the stamps under consideration, as to entitle them to any repayment or allowance from the United States.

The statute requires stamps to be affixed, "by the actual maker," to cigars, whether manufactured "upon commission or shares," or where "the material is furnished by one party and manufactured by another;" and, indeed, in all cases. (Rev. Stats., 3393, 3399; act March 1, 1879, sec. 16; 20 Stats., 348.)

Section 3426 of the Revised Statutes, as amended by section 17 of the act of March 1, 1879, (20 Stats., 349,) authorizes an allowance to be made for stamps "which, through mistake, may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected."

These provisions give a right in proper cases to an allowance *in favor of the "actual maker"* of the cigars. The legal title to the claim, the right of action, is in him. Accounting officers cannot, as a general rule, go back of this legal title to inquire into latent equities, or claims in equity arising from the fact that the stamps were paid for by other parties, or that the manufacturer was a mere trustee, or otherwise. This has been repeatedly decided. (Klink's case, 1 Lawrence, Compt. Dec., 247.) To entertain such an inquiry would be, in effect, to recognize the validity of the assignment of a claim against the Government. Such assignment is rendered void by statute, except upon certain conditions. (Rev. Stats., 3477; *Wheeler vs. United States*, 5 Nott & H., 504.) It is also prohibited by public policy. (*United States vs. Robeson*, 9 Pet., 325; *Billings vs. O'Brien*, 45 How. N. Y. Prac., 392; *Safford's case*, 1 Lawrence, Compt. Dec., 287.) It may be a hardship in such case as this to deny the claimants, who have ad-

vanced the money to buy all the stamps, the allowance which they claim; but it would be impracticable for the Government to undertake in all cases to inquire who advanced the money paid by manufacturers for stamps purchased by them. Section 3426 of the Revised Statutes, as amended by the act of March 1, 1879, (20 Stats., 349,) recognizes this view by saying that such allowance or redemption shall be made, either by giving other stamps in lieu of the stamps so allowed for or *redeemed*, or by *refunding* the amount or value to the owner thereof, deducting therefrom, in case of *repayment*, the percentage, if any, allowed to the *purchaser* thereof. This refers to the purchaser who is required to affix the stamps—the manufacturer.

II.—If Leggett & Co. were the rightful parties in interest, whose claim for allowance could be considered by the accounting officers, another question might possibly arise.

The particular reason for repacking the cigars does not clearly appear. If, for any reason, they were prepared for sale in a form “contrary to the laws of the State,” and if the parties holding them for sale caused them to be so prepared, the question whether they would be entitled to any relief would arise.

It seems to be supposed that, by the exact words of the statute, if stamps, “through mistake, may have been * * * unnecessarily used,” some person is entitled to an “allowance” therefor. (Rev. Stats., 3426.) The question might possibly be, in some cases, whether the stamps were so used under such circumstances as, in law and on grounds of public policy, would deprive the claimant of the right to be heard in support of a claim for allowance. Thus, to state a hypothetical case, if a party causes cigars to be manufactured and put in boxes with prize packages, to be sold in violation of law, can he be heard to assert a claim for an “allowance” for the stamps “unnecessarily used” in this illegal transaction? Judicial courts will not aid a party in carrying out an illegal act, contract, or purpose. *Allegans suam turpitudinem non est audiendus*. (Underhill *vs.* Van Cortlandt, 2 Johns. Ch., 350.)

“He that hath committed iniquity shall not have equity.” (Railroad Co. *vs.* Soutter, 13 Wall., 523.)

A right cannot arise from a wrong. (Klink's case, 1 Lawrence, Compt. Dec., 246; Meguire *vs.* Corwine, 101 U. S., 108; Gray *vs.* Sims, 3 Wash. C. C., 276; Ridgeway *vs.* Underwood, 4 Wash. C. C., 129; Hawkins *vs.* Cox, 2 Cranch, C. C., 173; Thompson *vs.* Milligan, *Id.*, 207; Hannay *vs.* Eve, 3 Cranch, Sup. Ct., 242; Schriber *vs.* Rapp, 5 Watts, Pa., 361; Bank of United States *vs.* Owens, 2 Pet., 527; Brown *vs.* Tarkington, 3 Wall., 377; Davidson *vs.* Lanier, 4 Wall., 447; Coppell

vs. Hall, 7 Wall., 542; *Thomas vs. Richmond*, 12 Wall., 349; *Harris vs. Runnells*, 12 How., 79; *Kennett vs. Chambers*, 14 How., 38; *Marshall vs. B. & O. R. R. Co.*, 16 How., 334; *Milne vs. Huber*, 3 McLean, 212; *Piatt vs. Oliver*, 1 McLean, 295; s. c., 2 McLean, 267; *Scudder vs. Andrews, Id.*, 464; *Nessmith and Nesmith vs. Sheldon et al.*, 4 *Id.*, 375; *Wilson vs. Le Roy*, 1 Brock., 447; *Armstrong vs. Toler*, 11 Wheat., 258; s. c., 4 Wash. C. C., 297; *Craig vs. Missouri*, 4 Pet., 411; *Clark vs. Protection Ins. Co.*, 1 Story, 109; *Harding vs. Walker, Hempst.*, 53.)

Executive officers would be bound, equally with the courts, to take cognizance of a palpable violation of law such as that supposed, and to apply to it the same principles and maxims which would govern the action of judicial tribunals. Though the accounting officers of the Treasury have not such power as the courts to make a thorough inquiry into the merits of any controversy, or alleged or suspected wrong; yet, they are clothed with extensive powers for instituting and conducting investigation into frauds, or attempted frauds, on the Government. (Rev. Stats., 184-186; *United States vs. Bailey*, 9 Pet., 255.)

The cigars in question have undoubtedly been twice stamped; the law requires only one stamping; the Government cannot desire to exact double taxes. (13 Op. Att.-Gen., 574.)

III. It remains to consider which of the claimants, Beir and Smith, has the better right to an "allowance" for stamps "unnecessarily used."

The stamps used by Beir in October, 1878, were not "unnecessarily used." The statute required the cigars to be stamped, and the stamping had not been done up to that time. No claim for an "allowance" exists by reason of the stamps *then* used. If such claim could have existed in October, 1878, it is barred by the act of March 1, 1879, (20 Stats., 349,) amending section 3426 of the Revised Statutes. If the claim existed on the 1st of March, 1879, it was barred by the express terms of that act, which contains this *proviso*: "That no existing claim for the redemption of or allowance for any internal-revenue stamps, other than the two-cent documentary stamps, shall be allowed, unless presented within one year from the date of the passage of this act." This claim was not so presented. It accrued only at the date of affixing the stamps on the cigars, as repacked and restamped between June 3, 1879, and January 12, 1880. In whose favor did it then accrue? Not in favor of Beir, because no stamps were "unnecessarily used" by him. In the *literal* sense, stamps were not "unnecessarily used" by Smith. He could not repack the cigars without destroying the original stamps; he could not sell the repacked cigars without there being unbroken stamps affixed thereto. (Rev. Stats., 3397, 3398; act of March 1, 1879,

sec. 16; 20 Stats., 347.) But, as the purpose of the statute was to require only one stamping, the provision for an "allowance" where stamps have been "unnecessarily used" must be deemed as applicable in cases in which it becomes necessary to repack cigars, but in which the necessity has not arisen from any violation of law. Within the meaning of section 3426 of the Revised Statutes, the last stamps affixed to the cigars in question were unnecessarily used. The expression "unnecessarily used" is equivalent to "used in excess of the amount required by the statute." Stamps may be necessarily used in obedience to some provisions of the law, and yet be "unnecessarily used" as respects section 3426 of the Revised Statutes. (Act March 1, 1879.) If stamps properly affixed should be *removed* by accident, or by the action of natural causes, as by water, &c., it might be necessary to affix new stamps in order to avoid prosecution—it is not intended to say to avoid conviction. In such circumstances an "allowance" for the stamps newly affixed might properly be made as for stamps "unnecessarily used." (13 Op. Att.-Gen., 574.)

The Commissioner of Internal Revenue is advised that no "allowance" can be made in favor of either of the claimants.

TREASURY DEPARTMENT,

First Comptroller's Office, July 1, 1881.

IN THE MATTER OF THE LEGALITY OF ALLOWING COMMISSION TO A POSTMASTER ON DISBURSEMENT OF MONEY APPROPRIATED FOR CONSTRUCTION OF PUBLIC BUILDING AT PLACE OF LOCATION OF A COLLECTOR OF CUSTOMS.—HUIDEKOPER'S CASE.

1. Construction given to sections 255, 1765, 3596, 3597, 3654, 3657, and 3658 of the Revised Statutes, and to the acts of June 22, 1874, and March 3, 1875, (18 Stats., 191, 415.)
2. By force of sections 3657 and 3658, the collector of customs "at the place of location of any" (1) custom-house, (2) court-house, (3) post office, or (4) marine hospital is "required to act as disbursing agent for the payment of all moneys * * * appropriated for the construction of" such building.
3. Under the act of June 22, 1874, sec. 23, (18 Stats., 190, 191,) no commission can be allowed for the disbursement of appropriations for *such* buildings, by collectors at (1) New York, (2) Boston and Charlestown, (3) Philadelphia, (4) San Francisco, (5) Baltimore, (6) New Orleans, (7) Portland and Falmouth.
4. Inasmuch as section 3657 of the Revised Statutes "requires" collectors of customs to act as disbursing agents of moneys appropriated for the erection of (1) custom-houses, (2) court-houses, (3) post offices, and (4) marine hospitals "at the place

- of location of any" such collector, it is not lawful to appoint any other officer or person to make such disbursements. If such other officer or person be appointed and act, he is not entitled to any compensation for the service.
5. Section 3654 of the Revised Statutes, as amended by act of March 3, 1875, (18 Stats., 415,) gives no right to, or authority to allow, commissions on moneys disbursed. It simply *limits* the amount which may be allowed in those cases in which some other statute gives a right to commissions.
 6. Assistant Treasurers of the United States are not entitled to any commission for disbursing money appropriated for the erection of public buildings.
 7. The Secretary of the Treasury is authorized, by section 255 of the Revised Statutes, to designate any *bonded officer* of the United States to disburse money appropriated for the erection of any public building at any place except for (1) custom-houses, (2) court-houses, (3) post offices, and (4) marine hospitals located at a place where there may be a collector of customs.
 8. This section, 255, declares that "the Secretary of the Treasury *may* designate any" bonded officer to act as disbursing agent for the payment of money "appropriated for the construction of public buildings." The word "*may*" is here permissive, and is not to be construed to mean "*shall*." He may, therefore, designate any *person* or corporation, in all cases in which he may appoint an officer, not interfering with those cases in which collectors are "*required*" to make disbursements.
 9. Under section 3657 of the Revised Statutes, collectors of customs *other* than those at (1) New York, (2) Boston and Charlestown, (3) Philadelphia, (4) San Francisco, (5) Baltimore, (6) New Orleans, and (7) Portland and Falmouth, are entitled to commissions as disbursing agents; and by the act of March 3, 1875, (18 Stats., 415,) not more than three-eighths of one per cent. for disbursing money appropriated to erect (1) custom-houses, (2) court-houses, (3) post offices, and (4) marine hospitals located at the place where the office of the collector may be, can be allowed for such commissions or compensation.
 10. When corporations, or persons not in the service of the United States, are lawfully appointed to disburse money appropriated for the erection of public buildings, they are, respectively, entitled to compensation not exceeding the limit fixed by the act of March 3, 1875.
 11. The prohibition in section 1765 of the Revised Statutes, against the allowance of extra compensation to officers for the disbursement of public money "*unless . . . the appropriations* therefor explicitly state that it is for such . . . compensation," has no application to officers in whom the law *elsewhere* vests a right to such compensation.
 12. In construing provisions of the Revised Statutes which in themselves are plain, resort cannot properly be had to the original statutes from which such provisions are taken.
 13. When one section of the Revised Statutes gives authority to the Secretary of the Treasury to require any *officer* to act as disbursing agent, another section which, in general terms, gives the Secretary authority to appoint disbursing agents, without limitation as to the class of persons to be appointed, will be regarded as applicable to *persons* and *corporations* not included in the previous section.
 14. This comprehensiveness of application results from the principle of construction that where two statutes of the same date, or separate provisions of the same statute, relate to the same thing, and one is more comprehensive than the

other, an effort should be made to give to that one some effect not embraced in or contemplated by the other.

15. The appointment of the postmaster at Philadelphia as disbursing agent of the money appropriated for the construction of the United States court-house and post-office building in that city was in contravention of the provision of section 3657 of the Revised Statutes; and, being unauthorized, the appointment conferred on him no right to commissions on the disbursements of such money.

August 10, 1880, the Secretary of the Treasury appointed H. S. Huidekoper, who is postmaster at Philadelphia, Pa., "disbursing agent of such funds as may be advanced" to him "on account of the appropriation [made by act of June 16, 1880; 21 Stats., 259] for construction of the United States court-house and post-office building at Philadelphia, * * * at a compensation of one-fourth of one per centum on the amount disbursed." Mr. Huidekoper gave bond, in due form, as such disbursing agent; and, in September, October, and November, 1880, received \$124,000, of which, to December 31, 1880, he disbursed \$100,365.68. On this amount his commissions for disbursement were allowed by the First Auditor in his report of March 23, 1881.

The question arises, in the settlement of Mr. Huidekoper's account, whether he is entitled to the commissions, or any part thereof, allowed by the First Auditor.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

During the period of the appointment and service aforesaid there was a collector of customs at Philadelphia, and the "place of location of" the court-house and post-office building referred to is at Philadelphia.

Among the statutory provisions relating to disbursements of money appropriated for the construction of public buildings, are the following sections of the Revised Statutes, with the modifications made since their enactment:

"SEC. 255. The Secretary of the Treasury may designate any officer of the United States, who has given bonds for the faithful performance of his duties, to be disbursing agent for the payment of all moneys appropriated for the construction of public buildings authorized by law within the district of such officer."

"SEC. 1765. No officer * * * or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

"SEC. 3654. No extra compensation exceeding one-eighth of one per centum shall in any case be allowed or paid to any officer, person, or corporation for disbursing moneys appropriated to the construction of any public building."

The section last cited is taken from the act of March 3, 1869, (15 Stats., 312.)

The act of March 3, 1875, (18 Stats., 415,) provides that the provision contained in the act approved March 3, 1869, limiting the compensation to be allowed for the disbursement of moneys appropriated for the construction of any public building, "was intended and shall be deemed and held to limit the compensation to be allowed to any disbursing officer who disburses moneys appropriated for and expended in the construction of any public building as aforesaid to three-eighths of one per centum for said services."

"SEC. 3657. The collectors of customs in the several collection-districts are required to act as disbursing agents for the payment of all moneys that are or may hereafter be appropriated for the construction of custom-houses, court-houses, post offices, and marine hospitals; with such compensation, not exceeding one-quarter of one per centum, as the Secretary of the Treasury may deem equitable and just."

This section, literally construed, would seem to *require* "collectors of customs in the several [customs] collection-districts" to act as disbursing agents of the appropriations made for the buildings therein named.

It is apparent, however, that the words "in the several collection-districts," are intended to include only "[1] custom-houses, [2] court-houses, [3] post offices, and [4] marine hospitals" "*at the place of location*" of the office of the collector, and not those elsewhere in the district. This will be evident by comparing sections 3657 and 3658; the latter of which provides that "where there is no collector at the place of location of any public work specified in the preceding section, the Secretary of the Treasury may appoint a disbursing agent for the payment of all moneys appropriated for the construction of any such public work, with such compensation as he may deem equitable and just." The collection districts include the whole country, (Rev Stats., Title XXXIV, Ch. 1, secs. 2517-2603;) and it would be most inconvenient to require collectors to make disbursements at places distant from their respective places of location.

Section 23 of the act of June 22, 1874, (18 Stats., 186, 190,) provides that "in lieu of the salaries, moieties, and perquisites of whatever name or nature, and commissions on disbursements, now paid to and received by the collectors, naval officers, and surveyors connected with the customs service in the several collection districts of the United States hereinafter named, there shall be paid," from and after the first day of July, 1874, an annual salary; and it then fixes the annual salaries of the collectors of the districts of (1) New York, (2) Boston and Charlestown, (3) Philadelphia, (4) San Francisco, (5) Baltimore, (6) New

Orleans, (7) Portland and Falmouth; as also the annual salaries of naval officers for the districts of New York, Boston and Charlestown, San Francisco, and Philadelphia; and of surveyors of the ports of New York, Boston, San Francisco and Philadelphia.

I.—The statutory provisions above quoted, or summarized, are somewhat incongruous and conflicting. Thus, section 255 of the Revised Statutes, taken *literally*, would seem to authorize the Secretary of the Treasury to “designate *any* officer of the United States, who has given bonds * * * to be disbursing agent * * ,” for the construction of public buildings.” Standing alone, it would give the Secretary authority to make the appointment now in question. This section is taken from the act of March 3, 1869, (15 Stats., 306.) By section 3657, “the collectors of customs *in the several collection-districts* are *required* to act as disbursing agents” for the construction of court-houses, post offices, &c. This is taken from the act of June 12, 1858, (11 Stats., 327, sec. 17.) The revision of the statutes properly treats this as not repealed by the act of March 3, 1869, (15 Stats., 301, 306; now section 255 of the Revised Statutes.) There is no express repeal; and both may, each as to buildings of different classes, stand and be operative. Thus, a collector in his district, with headquarters at the place of location of the public buildings mentioned, is required to make disbursements for the construction of (1) custom-houses, (2) court-houses, (3) post offices, and (4) marine hospitals; while, if the buildings to be erected are not located at his headquarters, the requirement does not apply, and other bonded officers may be appointed disbursing agents. This is simply applying the rule of construction, as to two statutes relating to the same thing, which gives to one “some operation not embraced in the other.” (Subpœna case, *ante*, 286. District Land-Office case, *post*; Territorial Court case, 3 Lawrence, Compt. Dec.; Property-Sales case, 3 Lawrence, Compt. Dec.)

II.—The statutes which control this case have an extensive application; and it is important that their provisions should be rightly understood. It will, therefore, not be amiss to consider their bearing more at large than the immediate question involved in the present case requires.

Section 3596 fixes the annual salaries of the assistant treasurers of the United States at (1) Boston, (2) New York, (3) Philadelphia, (4) Baltimore, (5) Charleston, (6) New Orleans, (7) St. Louis, (8) San Francisco, (9) Cincinnati, and (10) Chicago. The act of August 15, 1876, (19 Stats., 155,) abolished the office of assistant treasurer of the United States at Charleston, from and after September 30 of that year.

Section 3597 provides that the salaries fixed by section 3596 "shall be in full for the services of the respective officers, and none of them shall charge or receive any commission, pay, or perquisite, for any official service of any character or description whatsoever. Every such officer who makes any such charge, or receives any such compensation, shall be deemed guilty of a misdemeanor, and shall be fined or imprisoned, or both."

The assistant treasurers of the United States can therefore receive no commissions for services as disbursing agents. Although section 3654 of the Revised Statutes might, standing alone, be construed as giving authority to allow commissions for all officers, yet, when taken in its connection with other sections, it cannot authorize commissions in favor of the assistant treasurers named. Construing sections 3596 and 3597 together, and applying the rule which would give to one section some operation not embraced in the other, the result is, that the assistant treasurers named are prohibited from receiving any commissions for acting as disbursing agents. Section 3654 gives no *authority* to allow commissions to any officer. It is not an enabling or authority-giving section; it simply says, as to those cases in which by some other law commissions are or may be allowed, that there shall be a *limitation* on the amount to be allowed or paid under such law. Its sole purpose is to limit compensation. This is, in effect, declared to be the true construction by the act of March 3, 1875. (18 Stats., 415.) It may be true, as a rule of construction, that when a statute does allow compensation, and the extent of it is alone open to doubt, that view or interpretation which is most favorable to the officer rendering the service is the one generally to be adopted. (United States *vs.* Morse, 3 Stor. C. C., 87.) But this rule has no application where the *right* to any compensation is involved. Inasmuch as section 1765 of the Revised Statutes prohibits the officers therein described from receiving extra compensation, commissions or fees in their favor can exist only by statute. He who claims a right by statute must be able to point to the words which, by fair meaning, give it. By virtue of sections 3657 and 3658, collectors of customs in the several collection districts, and at the place of location of any public work, are the only proper disbursing agents of the moneys appropriated for the construction of (1) custom-houses, (2) court-houses, (3) post offices, and (4) marine hospitals.

As to (1) *these buildings* (2) in the several collection districts (3) at the place where a collector is located, therefore, no (1) assistant treasurer or (2) other officer than a collector of customs, can properly act as disbursing officer. If he act in that capacity, he can earn no right to com-

missions or other compensation. Section 1765 of the Revised Statutes forms another insuperable bar to his earning such right, except upon the conditions therein laid down. This bar will not be removed upon slight evidence of an intention to exempt a case or class of cases from its prohibition. The exemption must be distinctly made by Congress.

As to buildings other than custom-houses, court-houses, post offices, and marine hospitals located at the place where there may be a collector of customs, the Secretary of the Treasury may, by virtue of section 255, "designate any *officer* of the United States, who has given bonds for the faithful performance of his duties, to be disbursing agent for the payment of all moneys appropriated for the construction of public buildings authorized by law within the district of such officer." By section 1765 of the Revised Statutes, no officer so designated, "whose salary, pay, or emoluments are fixed by law or regulations," is entitled to "receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money," with a single exception, hereafter stated. This section is not abrogated, nor is its force impaired, except as to those cases clearly excluded from its operation, and which will be hereafter noticed. It establishes a general policy, prohibiting extra compensation for officers and persons having salaries or compensation fixed by law or regulations. This general purpose of Congress is to be respected; and only such cases or officers as Congress clearly intended in other provisions to exempt from its operation can be so exempted by the accounting officers of the Treasury.

Up to the passage of the act of June 22, 1874, (18 Stats., 190, 191,) collectors of customs were entitled, under the act of June 12, 1858, (11 Stats., 327; now section 3657 of the Revised Statutes,) to receive on their disbursements of moneys appropriated for the construction of custom-houses, court-houses, post offices, and marine hospitals, such compensation, not exceeding one-quarter of one per cent., as the Secretary of the Treasury might deem equitable and just. By the act of June 22, 1874, the right to such compensation or commissions was taken away from the collectors of customs at New York, Boston and Charlestown, Philadelphia, San Francisco, Baltimore, New Orleans, Portland and Falmouth; the annual salaries fixed by that act being "in lieu of the salaries, moieties, and perquisites of whatever name or nature, and commissions on disbursements," theretofore paid to and received by such collectors.

There are, however, other collectors of customs besides those at the places named. These *other* collectors are still entitled to commissions, under section 3657 of the Revised Statutes, for disbursing money ap-

propriated to erect custom-houses, court-houses, post offices, and marine hospitals at their respective places of location.

It is to be observed that the requirement to act as disbursing agent applies only (1) when the collector is "*at the place of location of any public work*" in his district, and only as to (2) the four classes of buildings specified, to wit, custom-houses, court-houses, post offices, and marine hospitals. It is only as to *such buildings* and at *such places* that these *other* collectors are entitled to commissions. Custom-houses, court-houses, post offices, marine hospitals, and *other buildings*, may be erected at points other than the places of location of the collectors of customs in the seven districts named in the act of 1874, or in other districts. In such event the collector is not by statute required to act as disbursing agent of the money appropriated for the construction of the buildings. He is, therefore, not entitled to commissions on any disbursements he may have made. He may, as to any building located away from his office, be by force of section 255 of the Revised Statutes, appointed to act as disbursing agent; but no statute gives him the right to commissions on disbursements made under such appointment, while the right is distinctly denied by section 1765.

III.—The cases in which collectors of customs are required by section 3657 of the Revised Statutes to act as disbursing agents have been stated. Many buildings will, of course, be erected, for which such collectors are not so *required* to act; but as to such buildings, they may, by virtue of section 255 of the Revised Statutes, under the designation of the Secretary of the Treasury, be authorized and required to act as disbursing agents of the money appropriated for the construction of the buildings. For such service no allowance of commission is authorized.

There are other cases in which commissions may be allowed. If there were no provision by statute as to disbursing agents, and no prohibition against commissions, as in section 1765 of the Revised Statutes, an appropriation act giving the head of a Department authority to erect a building would carry with it the incidental authority to appoint the necessary disbursing agent, and to pay compensation in the discretion of the appointing power. (Geological-Survey case, *ante*, 133; Swamp-Land case, *ante*, 136.) This authority is, however, abridged by section 1765 of the Revised Statutes, as to *officers* and *persons* whose salary, pay, or emoluments are fixed by law or regulations. The only salaried officers excepted from the operation of this section, and hence the only officers who are entitled to commissions for disbursing money appropriated for the construction of public buildings, have been already

indicated; namely, collectors of customs *other* than those at New York, Boston and Charlestown, Philadelphia, San Francisco, Baltimore, New Orleans, Portland and Falmouth. These are entitled to commissions on disbursements of money appropriated for the erection of (1) custom-houses, (2) court houses, (3) post offices, and (4) marine hospitals at their respective places of location. Under a strict and literal construction of section 1765, even *these* officers, in the cases stated, would not be entitled to compensation by commissions, unless "the *appropriation* therefor explicitly states that it is for *such* * * * compensation." This requirement as to the appropriation does not apply in the cases stated, because the right to commissions exists under another section (3657) of equal dignity and authority; and, again, the requirement is to apply and have effect as to other cases than those provided for in section 3657. (See 4 Op. Att.-Gen., 248.) If, however, Congress should make an appropriation to a person, by *name*, for a particular service not connected with an office, and there were nothing to show that Congress was aware that it was thereby appropriating compensation to an officer outside of, and additional to, his salary, a different question would be presented. In that case, the effect of section 1765 on *such* an appropriation would be the chief point for consideration. The Secretary of the Treasury may, under the limitation laid down in section 3657, designate any person, or corporation, to disburse money appropriated for the erection of public buildings. Collectors of customs at the places of location of custom-houses, court-houses, post offices, or marine hospitals to be erected, are required, to the exclusion of all others, to act as disbursing agents. The authority of the Secretary of the Treasury to appoint persons and corporations as disbursing agents is recognized by section 3654 of the Revised Statutes, in limiting to one-eighth of one per cent. the extra compensation which may be allowed or paid "to any officer, *person*, or *corporation* for disbursing moneys appropriated to the construction of any public building." The right to appoint "persons" other than officers to disburse public money is equally recognized by section 1765; and it is also implied in the authority to erect buildings for which appropriations are made. (Eveleth's case, *ante*, 20; Geological-Survey case, *ante*, 133; Swamp-Land case, *ante*, 136.)

Section 255 of the Revised Statutes does not militate against the right, but rather recognizes it. It declares that "the Secretary of the Treasury *may* designate any officer * * * to be disbursing agent." The word "may" is permissive, and is not to be construed as *shall*. The purpose of the section is to impose upon any and every officer the duty of making disbursements, when required by the Secretary, of the

moneys appropriated for the construction of public buildings authorized by law within the district of such officer. It *enlarges* the authority of the Secretary as to the appointment of disbursing agents. Without the authority given in this section it might well have been doubted whether an officer charged by law with the performance of other duties could be required to make disbursements. The whole legislation on this subject shows that the word "may," in this instance, was designed to give a discretionary power. (Sedgwick, Stat. and Const. L., 375; Cutler *vs.* Howard, 9 Wis., 309; Wheeler & Bonner *vs.* The City of Chicago, 24 Ill., 105; Seiple *vs.* Borough of Elizabeth, 3 Dutch., 407; Blake *vs.* Portsmouth and Concord R. R., 39 N. H., 435; Jones *vs.* Harrison, 6 Exch., W. H. & G., 328; 2 Lowndes, M. & P., 257; Latham *et al.* *vs.* Spedding, 17 Adolph. & Ell., 439; Rex *vs.* The Mayor, &c., of Hastings, 1 Dowl. & Ryl., 148.)

Such persons and corporations, when appointed as disbursing agents of the money appropriated for the erection of public buildings, are respectively entitled to such commissions for services as may be agreed on, not exceeding the limit of three-eighths of one per cent. fixed by the act of March 3, 1875, (18 Stats., 415.) Of course, *persons* in the public service, with compensation fixed by law or regulations, are excluded from the right to commissions by section 1765 of the Revised Statutes. The provision of section 3658 of the Revised Statutes, that "where there is no collector at the place of location of any public work specified in the preceding section, the Secretary of the Treasury may appoint a *disbursing agent* * * * with such compensation as he may deem equitable and just," was not designed to authorize commissions in any other than the cases already stated. The act of June 12, 1858, section 17, (11 Stats., 327; now section 3657 of the Revised Statutes,) required the collectors of customs "in the several collection districts" to make disbursements for custom-houses, court-houses, post offices, and marine hospitals. It contained a *proviso*—"That where there is no collector at the place of location of any public work herein specified, the superintendent of such public work shall act as disbursing agent without any additional compensation therefor." The act of July 28, 1866 (14 Stats., 341), repealed this proviso, and substituted in lieu of it the provision contained in section 3658 of the Revised Statutes. Under this provision, and that in section 255, the Secretary of the Treasury was and is authorized, when there is no collector at the place of location of the building to be erected, to appoint any officer or other person as disbursing agent of the money appropriated for its construction. If there had been no *other* statute affecting the right to compensation for such disburse-

ment, officers and other persons would alike have been entitled to it. Section 3657 recognizes the right of the disbursing agent so appointed to "such compensation, not exceeding one-quarter of one per centum," as the Secretary of the Treasury "may deem equitable and just." That this section gives to *persons* who are not officers a right to such compensation is clear. Here, then, it has scope for its operation. What is its effect as to *officers*? In mere words it is broad enough to cover the allowance of commissions to them. But section 1765, which was previous law, ever since continued in force, forbids such allowance. In this conflict which provision shall prevail?

It is sufficiently clear that Congress did not intend officers to have commissions in such cases. The act of 1858 required the superintendent of the work—an *officer*—to disburse the money "without any additional compensation therefor." Section 3658 substitutes for the superintendent "a disbursing agent." Now, when this disbursing agent happens to be an *officer* of the United States, the original purpose of the act of 1858, and the whole policy of section 1765, require that such officer shall, like the superintendent under the old law, disburse the money "without any additional compensation therefor." Congress evidently had in view the appointment of non-official persons as disbursing agents—not of officers of the United States. The purpose was to relieve officers of the duty theretofore incumbent on them, and give authority to substitute other persons to make the necessary disbursements. This is a case, then, in which the "general words" of the statute as to compensation "may be aptly restrained according to the subject-matter." (Broom, Leg. Max., 646; Thorpe *vs.* Thorpe, 1 Ld. Raym., 235, 662.) They may be properly qualified, as they are, by section 1765. (Wood *vs.* Rowcliffe, 6 Exch., 407.) In the revision of the laws they are, as a connected whole, qualified by section 255. It is now well settled that, when the meaning of any provisions of the Revised Statutes is plain, no reference is to be made to the original statutes to interpret them in a different sense. (United States *vs.* Bowen, 100 U. S., 508; United States *vs.* Hirsch, 100 U. S., 35; Arthur *vs.* Dodge, 101 U. S., 34.)

Long before the act of 1858 the custom of appointing *officers* as disbursing agents had prevailed. (See the acts of January 25, 1828—4 Stats., 246; March 3, 1839—5 Stats., 349; August 26, 1842—5 Stats., 533; June 17, 1844, section 4—5 Stats., 703.) The proviso in the act of March 3, 1869, (15 Stats., 301, 306,) now section 255 of the Revised Statutes, would seem to have been unnecessary. It is a statutory grant of an authority, whose existence and exercise had frequently been

recognized by Congress, to appoint *officers* of the United States as disbursing agents. The act may have made it the duty of any officer properly designated by the Secretary of the Treasury to assume and perform the trust of disbursing all moneys appropriated for the construction of public buildings authorized by law in his district; and in this respect it may have served a useful purpose. If officers so designated be held entitled to commissions on the disbursements made by them, section 1765 of the Revised Statutes will have been *pro tanto* repealed; and as repeals by implication are discouraged by a well-established and salutary rule of statutory construction, such a result must be avoided, and the prohibition of the section be held to apply to the case of disbursing agents for public buildings.

Again, the rule applies, that where two provisions of the same statute or different statutes relate to the same subject, "there will be an effort to give one of the acts some operation not embraced in the other, so that each may, if possible, have some effect, and that the legislature may not appear to have done a vain and useless thing." (Naz. Lit. and Ben. Inst. *vs.* Commonwealth, 14 B. Monroe, 266; *Movius vs. Arthur*, 95 U. S., 144; *Arthur vs. Lahey*, 96 U. S., 113; *Homer vs. The Collector*, 1 Wall., 486; *Reiche vs. Smythe*, 13 Wall., 162; *Smythe vs. Fiske*, 23 Wall., 374.) Section 3658 of the Revised Statutes serves the purpose of authorizing compensation for persons other than officers of the United States, and it can thus have effect without interfering with the policy of section 1765.

As to the allowance in favor of Mr. Huidekoper by the First Auditor, section 3657 of the Revised Statutes is clear and imperative in its phraseology: the collectors of customs are "*required* to act as disbursing agents." The allowance must therefore be rejected.

When a collector of customs is absolutely "*required*" to perform a given duty, no other person can be lawfully required to perform the same duty; and it is only "where there is no collector at the place of location of any public work specified in the preceding section," that the Secretary of the Treasury is authorized by section 3658 to appoint a disbursing agent for the payment of the moneys appropriated for the construction of any such public work. Since this condition did not exist in Philadelphia, the appointment of the postmaster as disbursing agent was unauthorized, and he is consequently entitled to no commissions on the disbursements made by him.

TREASURY DEPARTMENT,

First Comptroller's Office, July 5, 1881.

The following circulars may fitly be appended to the discussion in the text:

Circular Instructions relative to Public Moneys and Official Checks of United States Disbursing Officers.

1876.
DEPARTMENT NO. 107. }
Ind. Treasury Div. No. 26. }

TREASURY DEPARTMENT,
Washington, D. C., August 24, 1876.

The following sections of the Revised Statutes are published for the information and guidance of all concerned:

"SECTION 3620. It shall be the duty of every disbursing officer having any public money intrusted to him for disbursement, to deposit the same with the Treasurer or some one of the assistant treasurers of the United States, and to draw for the same only as it may be required for payments to be made by him in pursuance of law; and all transfers from the Treasurer of the United States to a disbursing officer shall be by draft or warrant on the Treasury or an assistant treasurer of the United States. In places, however, where there is no Treasurer or assistant treasurer, the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depository, or, in writing, authorize the same to be kept in any other manner, and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors."

"SECTION 5488. Every disbursing officer of the United States who deposits any public money intrusted to him in any place or in any manner, except as authorized by law, or converts to his own use in any way whatever, or loans with or without interest, or for any purpose not prescribed by law withdraws from the Treasurer or any assistant treasurer, or any authorized depository, or for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is, in every such act, deemed guilty of an embezzlement of the money so deposited, converted, loaned, withdrawn, transferred, or applied; and shall be punished by imprisonment with hard labor for a term not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than one thousand dollars, or by both such fine and imprisonment."

In accordance with the provisions of the above sections, any public money advanced to disbursing officers of the United States must be deposited immediately to their respective credits, with either the United States Treasurer, some assistant treasurer, or designated depository, other than a national-bank depository, nearest or most convenient, or, by special direction of the Secretary of the Treasury, with a national-bank depository, except—

(1.) Any disbursing officer of the War Department, specially authorized by the Secretary of War, when stationed on the extreme frontier or at places far remote from such depositaries, may keep, at his own risk, such moneys as may be intrusted to him for disbursement.

(2.) Any officer receiving money remitted to him upon specific estimates, may disburse it accordingly, without waiting to place it in a depository, provided the payments are due, and he prefers this method to that of drawing checks.

Any check drawn by a disbursing officer upon moneys thus deposited, must be in favor of the party, by name, to whom the payment is to be made, and payable to "order" or "bearer," with these exceptions:

(1.) To make payments of individual pensions, checks for which must be made payable to "order," (2) to make payments of amounts not exceeding twenty dollars, (3) to make payments at a distance from a depository, and (4) to make payments of fixed salaries due at a certain period; in either of which cases, except the first, any disbursing officer may draw his check in favor of himself or bearer for such amount as may be necessary for such payment, but in the last-named case the check must be drawn not more than two days before the salaries become due.

Any disbursing officer or agent drawing checks on moneys deposited to his official credit, must state on the face or back of each check the object or purpose to which the avails are to be applied, except upon checks issued in payment of individual pensions, the special form of such checks indicating sufficiently the character of the disbursement.

Such statement may be made in brief form, but must clearly indicate the object of the expenditure, as, for instance, "pay," "pay-roll," or "payment of troops," adding the fort or station; "purchase of subsistence" or other supplies; "on contract for construction," mentioning the fortification or other public work for which the payment is made; "payments under \$20;" "to pay foreign pensions," &c.

Checks will not be returned to the drawer after their payment, but the depository with whom the account is kept shall furnish the officer with a monthly statement of his deposit account.

tract will bear upon their face a reference to this authority already furnished. When the payee is unable to write, he will make his signature by mark, and such signature must be properly attested.

V. Payment will not be made to heirs, executors, administrators, receivers, assignees, or other successors, or legal representatives, (except in the case of attorneys referred to in the preceding section,) until the account has been passed upon by the proper accounting officers of the Treasury. To enable these officers to acquire a full understanding of the subject, and to take such action as the laws and regulations prescribe in such cases, the account, covered by full letter of explanation, must be sent to this Department accompanied by the original letters of administration (if any are issued) or properly authenticated order of the court, as the case may be, when, after consideration, instructions as to payment will be given.

VI. The disbursing agent should attend personally, wherever practicable, to the paying out of all moneys; and receipts to the pay-rolls as well as other vouchers, except in the case of non-resident creditors, should be made in his presence, or in that of some trusty person whom he may depute for that purpose. Immediate payment should be made to all mechanics and laborers at the time of signing the rolls.

VII. In order to facilitate the examination of disbursing agents' accounts whenever such examination may be directed, as well as to enable them to keep their records in a proper manner, each voucher should be paid by a single check, the stub of which check should be identified with the voucher by memorandum of the voucher number. An entire pay-roll will be regarded as one voucher, the amount of which will be drawn by one check, and the money paid direct to the employés. As the superintendent's office is located immediately at the work, and as he is required to be present during all the working-hours of the day, much time will be saved, and identification of the men facilitated, if the rolls are paid at his office; and, for these reasons, this class of disbursements is directed to be made at that place.

VIII. The disbursing agent will not regard processes of attachment against public funds, nor under any circumstances pay into the hands of a creditor of an employé in the public service any moneys due such employé except upon a duly executed power of attorney.

IX. Before making payment of any voucher, the disbursing agent should give it careful scrutiny to see that it is in proper form, that its computations are correct, that the expenditures are incurred under proper authority, that the prices are charged in accordance with contract rates; and when any fact comes to the knowledge of the disbursing agent tending to show that the services or supplies charged for have not been actually rendered or delivered, or are not at fair or contract prices, or that the expenditure is extravagant or unauthorized, it will be his duty, notwithstanding the voucher therefor may bear the certificate of the superintendent, to withhold payment and report the case to the Department for instructions. Vouchers will bear no credits by way of return or sale of public property of any kind; such property, when disposed of, must be sold for cash, and the proceeds deposited according to law.

X. By section 3622, Revised Statutes, it is made the duty of all disbursing officers to transmit their accounts "to the bureau to which they pertain within ten days after the expiration of each successive month." It is desirable in the case of accounts for construction or repairs of public buildings that the accounts therefor, with the vouchers necessary to their correct and prompt settlement, be received at this Department at a date prior to that provided by the statute. Disbursing agents will therefore, wherever practicable, close their accounts for any month on the first day of the succeeding month, and forward such accounts on the evening of the same day to the Secretary of the Treasury.

XI. The monthly accounts comprise the following-named papers: One set of the vouchers (Forms 2 and 3) paid during the month, one abstract (Form 5) of such vouchers, and one account current (Form 6)—which will be sent to this Department as herein directed. Duplicates of the vouchers paid will be retained by the disbursing agent, his copies of abstracts and accounts current being kept in books to be furnished for that purpose by the Department. One abstract and one account current, each month, will be given to the superintendent for the files of his office.

XII. All communications from this Department to the disbursing agent should be acknowledged on the day of receipt if practicable. All official communications from him will be addressed to the Secretary of the Treasury, and all documents transmitted will be so indorsed as to show at a glance their purport. If there be more than one, the enclosures should be enumerated in the letter of transmission.

XIII. The attention of disbursing agents is specially directed to the following-named sections of the Revised Statutes of the United States: 3618, 3620, 3621, 3622, 3623, 3624, 3633, 3733, 5488, 5491, 5496, and 5503, and to Department Circular, No. 107, August 24, 1876.

JOHN SHERMAN,
Secretary.

IN THE MATTER OF PAYING THE SALARIES, FEES, AND COMMISSIONS OF REGISTERS AND RECEIVERS OF LAND OFFICES OUT OF THE PROCEEDS OF SALES OF INDIAN LANDS.—INDIAN-LAND CASE.

1. The Osage treaty of January 21, 1867, (14 Stats., 687,) provides for the survey and sale of Osage lands, the proceeds of which, "after reimbursing the United States the cost of said survey and sale," are to be paid into the Treasury to the credit of the Indian "civilization fund."
2. No authority has been given in the treaty, or by statute, for the application of any of the proceeds of sale in payment of salaries, fees, commissions, or expenses incurred in the survey and sale of the ceded lands.
3. So much of the proceeds of each sale as may be necessary to reimburse the United States is money received "for the use of the United States," within the meaning of section 3617 of the Revised Statutes; and by the express requirement of this section such money must "be paid by the officer * * * receiving the same into the Treasury" of the United States "without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever."
4. No part of the proceeds of the sale of the Osage trust and diminished reserve lands can, therefore, be transferred to the credit of the disbursing agent for supplying the deficiency in the appropriation for salaries, fees, and commissions of registers or receivers.

June 14, 1881, the Acting Commissioner of the General Land Office addressed to the First Comptroller a letter, as follows:

SIR: Owing to a deficiency in the appropriation for salaries, fees, and commissions of registers and receivers for the current fiscal year, the Honorable Secretary of the Interior has directed that a *pro rata* distribution be made of the unexpended balance of the appropriation, based upon the receipts of the various offices for the quarter ending March 31, 1881.

In compliance with said instructions, advances have been made to receivers acting as disbursing agents, of forty per centum of the amounts estimated by them as necessary to pay the salaries and such fees and commissions of themselves and registers as may be earned by them during the current quarter.

The office at Independence, Kansas, is a maximum office, and an advance of \$600 was made to the receiver, being forty per centum of his estimate of \$1,500.

In addition to the public lands disposed of in this district, are included Osage trust and diminished reserve lands; and the receiver has, under date of May 30, 1881, (copy enclosed,) requested that he be permitted to transfer to his account as disbursing agent the sum of \$900 from the proceeds of the sale of said Indian lands, with a view to supplying the deficiency in the salaries, fees, and commissions of himself and the register.

He bases his application upon a letter from this office dated April 28, 1878, (copy herewith,) wherein permission was given him to transfer from the proceeds of sales of Osage and Cherokee Indian lands, to his account as disbursing agent, the respective sums of \$949.11 and \$336.82, which were accounted for, per accounts accompanying General Land-Office reports Nos. 26,232 and 26,255, as having been used in the payment of salaries, fees, and commissions.

Section 3617 provides that the gross amount of moneys received from whatever source for the use of the United States, except as otherwise provided in section 3618, shall be paid into the Treasury without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. The only exception is, that relating to the revenues of the Post-Office Department.

Section 5 of the act of May 28, 1880, (Pub. Laws, page 143, chapter 107,) provides that in the disposal of the Osage trust and diminished reserved lands, the register and receiver shall be allowed the same fees and commissions as are allowed in the disposal of public lands, and the net proceeds of the sales of said lands, after deducting the expenses of such sales, shall be deposited, &c.

All clerks in local land offices employed upon work connected with the disposal of Indian lands are paid from the proceeds of the sale of said lands, and it has been the custom heretofore where a deficiency existed in salaries, fees, and commissions, to supply it from the proceeds of the sales of Indian lands in districts where such lands are situated.

As there seems to be no authoritative decision from your office relative to this and the proceeds of sales of other Indian lands, I have the honor to submit the question for your decision, with the request that it be made at as early a date as practicable.

Very respectfully,

C. W. HOLCOMB,
Acting Commissioner.

OPINION BY WILLIAM LAWRENCE, *First Comptroller:*

There are many treaties with Indian nations and tribes which provide for the sale of lands formerly in their occupancy, and for the payment or investment of the net proceeds of sale, after paying the expenses of survey and sale.

The act of May 28, 1880, which provides for the disposal and sale of Osage trust and diminished reserve lands, enacts:

"That the register and the receiver shall be allowed the same fees and commissions as are allowed by law for the disposal of the public lands, and the net proceeds of the sales and disposals, after deducting the expenssss of such disposals, shall be deposited to the credit of the proper Indian fund, as provided by existing laws; and the Secretary of the Interior shall make all rules and regulations necessary to carry into effect the provisions of this act." (21 Stats., 144, sec. 5.)

This act is in aid of sundry prior acts, viz: Acts of July 20, 1868, (15 Stats., 119,) July 15, 1870, (16 Stats., 362,) May 9, 1872, (17 Stats., 90,) and June 23, 1874, (18 Stats., 283.)

These acts were passed in order to execute the Osage treaty proclaimed January 21, 1867, (14 Stats., 687,) which provided for the survey and sale of lands ceded "under the direction of the Secretary of the Interior;" and directed that "after reimbursing the United States the cost of said survey and sale * * * the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' * * *."

The acts of March 3, 1849, (9 Stats., 398,) and of September 28, 1850, (9 Stats., 507,) as carried into the Revised Statutes, section 3617, provide that "The gross amount of all moneys received from whatever source *for the use of the United States*, except as otherwise provided in the next section, shall be paid by the officer or agent receiving the same *into the Treasury* at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post-Office Department." The salary, fees, and commissions of registers and receivers are prescribed by statute. (Rev. Stats., 2237, 2238, 2239, 2240, 2241.) Congress has uniformly made appropriations for the payment of their salaries, fees, and commissions; and without such appropriations no compensation could, consistently with the provision of section 3617, be paid to these officers. When Congress intended that "fees" should be used in paying compensation of officers, it expressly provided for such use by an appropriation. (Rev. Stats., 3687.) The fifth section of the act of May 28, 1880, above quoted, provides that the register and receiver shall be allowed the same fees and commissions for the sale and disposal of Osage trust and diminished reserve lands as are allowed by law for the disposal of the public lands.

This section makes no appropriation; it merely fixes a *right* to "fees and commissions" as compensation for services to be rendered in relation to the disposal of lands which were not "public lands." No money can be *paid* from the Treasury, or from the proceeds of the sales of such Indian lands, by force of this act.

It is unnecessary to inquire whether the treaty-making power is capable of *authorizing a sale* of such lands and *also* of directing the appropriation of part of the proceeds in payment of "fees and commissions." (See *Holden vs. Joy*, 17 Wall., 223; *Cherokee Tobacco*, 11 Wall., 616; *Turner vs. American Baptist Missionary Union*, 5 McLean, 344; *Humphreys vs. United States*, Dev. Ct. Cls., 204; *Kendall vs. United States*, 1 Nott & H., 261; *Gray vs. Clinton Bridge Co.*, 16 American Law Reg., 149; *Taylor vs. Morton*, 2 Curt. C. C., 454; *Wood vs. M. K. & T. Rail.*

way Co., 11 Kansas, 323; "Lawrence's Arguments" in Law Library of Congress.)

The treaty with the Osages has not in specific terms made such appropriation, though in effect it does stipulate or *contract* that such an appropriation may be made by Congress. It is not in the form of an appropriation act.

The treaty is, in respect to the matter now being considered, a *contract* requiring legislation to carry it into effect. For example, it fixes a *right of the United States* to be *reimbursed*, but gives no authority to any officer to apply to that purpose any money accruing from the sales of the land. The treaty and the act of May 28, 1880, both require the *net proceeds* of sales to be paid into the Treasury to the credit of the Indian civilization fund. No express declaration is made in either the treaty or the act as to what shall be done with *the portion* of the proceeds of sales which is applicable to the *reimbursement of the United States for the cost of survey and sale*. The disposition of *this portion* of the proceeds is, however, provided for by section 3617 of the Revised Statutes, which, with one exception not now material, directs the payment into the Treasury of "the gross amount of all moneys received from whatever source for the use of the United States." This portion is received "for the use of the United States," to reimburse it the expenses of survey and sale. The entire proceeds of sale must therefore be paid by the proper receiver into the Treasury.

The provision for reimbursement implies that Congress is to advance the requisite amount of money to defray the expenses of survey and sale, and that an equal sum is to be repaid to the Treasury. If the proceeds of sale may be directly applied in payment of the expenses of sale, there can, *pro tanto*, be no reimbursement. It was not contemplated, when the treaty was made, that the proceeds of sale could be used to pay expenses of survey and sale; or that such proceeds could, so far as expenses incident to survey and sale of land are concerned, be used for any other purpose than that of reimbursing the Government after it had made advances therefor. The treaty should not be construed as authorizing the use of the money in paying salaries or other official compensation without an appropriation by Congress, if its words will fairly admit of a different construction; because the treaty, if held to give such authority, would, *pro tanto* and by implication, repeal section 3617 of the Revised Statutes, the policy of which should not be thwarted or invaded. It would, if so held, be contrary to the spirit and purpose of that provision of the Constitution which says that "No money shall be drawn from the Treasury, but in consequence of appropriations made by law."

The reimbursement proceeds of sales are not to be paid to the credit of any particular appropriation, because they have not been so appropriated by Congress.

The proper amount to be reimbursed is to be ascertained from the accounts in which the expenses are allowed. That amount is then to be covered into the Treasury as miscellaneous receipts applicable to the reimbursement of the United States for expenses of survey and sale.

The phrase, "for the use of the United States," in section 3617 of the Revised Statutes, is to be liberally construed as including all money subject to the control of Congress.

In confirmation of the foregoing views as to the necessity of an appropriation, it might be added that Congress seems to have regarded "fees" accruing under the customs laws as payable into the Treasury, and as requiring an *appropriation* to authorize their use in paying compensation of officers. Thus, section 3687 of the Revised Statutes makes a permanent annual appropriation of a fixed sum, "in *addition* to such sums as may be received from fines, penalties, and forfeitures connected with the customs, and from fees paid into the Treasury by customs officers, and from storage, cartage, drayage, labor, and services."

The Commissioner of the General Land Office is advised that no part of the proceeds of the sale of the Osage trust and diminished reserve lands can be transferred to the credit of the disbursing agent for supplying the deficiency in the appropriation for salaries, fees, and commissions of registers or receivers.

TREASURY DEPARTMENT,

First Comptroller's Office, July 6, 1881.

IN THE MATTER OF THE RIGHT OF THE DONEE OF A POWER OF ATTORNEY FOR SALE AND ASSIGNMENT OF GOVERNMENT BOND WHICH IS "CALLED" FOR REDEMPTION TO HAVE TREASURY DRAFT IN PAYMENT THEREOF ISSUED IN HIS OWN NAME.—MOODIE'S CASE.

1. A power of attorney authorizing an agent to "sell and assign" a Government bond "called" for redemption, gives authority to the agent to assign such bond for redemption to the Secretary of the Treasury, and to receive in payment thereof a draft drawn by the Treasurer of the United States to the agent by name, which draft the agent can indorse for collection or payment.
2. A power of attorney conveys authority to do whatever is necessary and usual, in order to secure the objects for which it may reasonably be supposed to have been given.
3. The proper construction to be given to a power of attorney is that which will render it practicable to carry out the intention of the maker.

Edw. R. Moodie, of England, is the owner of United States registered bond No. 11834, of the acts of July 17 and August 5, 1861, for \$5,000, with interest at 6 per cent., payable semi-annually, and redeemable after the 30th of June, 1881; which bond, with others of its class, is called for payment. Moodie executed a power of attorney as follows:

"Know all men by these presents, that I, Edwin R. Moodie, of Rock Ferry, Birkenhead, England, do hereby appoint Blake Bros. & Co., of New York, N. Y., my attorney to sell and assign any and all United States stock now standing or which may hereafter stand, in my name on the books of the Treasury Department, granting to said attorney power to appoint one or more substitutes for the purpose herein expressed, hereby ratifying and confirming all that may be lawfully done by virtue hereof.

"Witness my hand and seal, this 28th day of December, 1880.

"E. R. MOODIE. [SEAL.]"

This is duly authenticated.

Under this power, an assignment was made in the usual form, as follows:

"For value received, I assign unto Secretary of Treasury for redemption the within certificates of United States stock issued by the Treasury Department, and hereby authorize the Register of the Treasury to transfer said stock on the books of the Department.

EDWIN R. MOODIE,

"By BLAKE BROS. & Co., Attorneys."

This is duly authenticated.

The question is submitted to the First Comptroller whether a draft in payment of the bond should issue in the name of the attorneys, Blake Bros. & Co., or in that of the owner, Mr. Moodie.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

The Treasurer of the United States generally makes payment of bonds by his draft, either on himself or an assistant treasurer of the United States. (Rev. Stats., 3593, 3644.) If the draft in this case be issued payable to Moodie, it will be necessary to send it to him in England for his indorsement. This will work delay and inconvenience.

The question now presented for consideration is: What is the effect or extent of the power of attorney?

The power appoints Blake Brothers & Co. as attorneys "to sell and assign" the bond. This is the usual form for securing such payment, in order to which the bonds are assigned for redemption to the Secretary of the Treasury.

Story says that a power of attorney is always to be "construed to include all the necessary and usual means of executing it with effect, unless a different purpose be clearly expressed." (Agency, sec. 58.) Perhaps this does not quite fully express the correct idea as applicable to this case. Here the power is "to sell and assign." This power, of course, includes "all the necessary and usual means of executing" the power; that is, of making a sale and assignment of the bond. It gives authority to execute such papers as are usually made in order to effect a sale and assignment. It includes authority to do whatever is necessary and usual in order to secure the objects for which it may reasonably be supposed to have been given. (Police-Station case, *ante*, 338.) A power to sell and convey lands includes an authority to receive the purchase-money. (Peck *vs.* Harriott, 6 Serg. & Rawle, 149; Yerby *vs.* Grisby, 9 Leigh, Va., 387; United States *vs.* Gratiot, 14 Pet., 538.) The power "to sell and assign" a Government bond includes, on principle and authority, the right to make the necessary indorsement to the Secretary of the Treasury. (Fenn *vs.* Harrison, 4 Term R., 177; Nickson *vs.* Brohan, 10 Mod., 109; Hicks *vs.* Hauken, 4 Esp., 116; Lloyd's Paley on Agency, 209.)

The power of attorney was given in view of the usage in such case, and is to be construed with reference to it. (1 Greenl. Ev., secs. 292, 294.) Upon every principle of construction applicable to this power, it gives authority to receive money, and therefore, by necessary inference, to receive a draft in the name of the attorney, and to indorse it for collection or payment. It can scarcely be supposed that the owner in England gave the power of attorney in this case for the mere purpose of making a sale and assignment of the bond, and that, after such sale and assignment, he intended to come to the United States in person to receive payment, or else to send another power to Blake

Bros. & Co., or some other attorney, to receive payment or indorse the draft therefor. The proper construction to be given to a power of attorney is that which will render it practicable to carry out the intention of the maker.

Under the power to Blake Bros. & Co., a sale might have been made to a private purchaser; in which event, they would clearly have been authorized to receive payment. The power authorized an assignment for redemption to the Secretary of the Treasury. Such assignment is a sale of the bond, and entitles the assignor to receive payment.

The Secretary of the Treasury is advised that the draft in payment of the redeemed bond may properly be issued in the name of Blake Bros. & Co., whom it may be well to describe therein as attorneys.

TREASURY DEPARTMENT,

First Comptroller's Office, July 7, 1881.



IN THE MATTER OF THE RIGHT OF AN OFFICER TO THE WHOLE AMOUNT OF THE ANNUAL SALARY FIXED BY THE REVISED STATUTES FOR HIS OFFICE, ALTHOUGH CONGRESS HAS APPROPRIATED A LESS AMOUNT "IN FULL COMPENSATION FOR THE SERVICE OF THE FISCAL YEAR."—WALLACE'S CASE.

1. The First Comptroller will not certify a balance due to a claimant, until the proper Auditor has acted on the claimant's account.
2. An officer of the Government, whose salary is fixed by statute, does not lose his right to any part thereof by reason of the failure of Congress to make for any year an appropriation sufficient to pay the whole of it.
3. Any portion of such salary left unpaid for want of a sufficient appropriation, is to be reported to the Speaker of the House of Representatives, pursuant to section 4 of the act of June 14, 1878, (20 Stats., 130.)
4. When only a part of such salary due for each quarter of the year is paid, no protest for non-payment of the residue is necessary in order to save the right of the claimant thereto.
5. Section 1845 of the Revised Statutes fixes the annual salary of the governor of each of the Territories at \$3,500. The appropriation acts for the fiscal years ending, respectively, June 30, 1879, June 30, 1880, and June 30, 1881, appropriated for such annual salary only \$2,600, and declared each appropriation to be "in full compensation for the service of the fiscal year" for which it was made. This operated as a suspension, for the years stated, of the rate of salary fixed by the Revised Statutes, and as the establishment in lieu of it for those years of a salary of \$2,600.
6. The cases stated in which a receipt of payment in full bars any further claim.

Section 1845 of the Revised Statutes provides that "the annual salaries of the governors of the several Territories shall be three thousand five hundred dollars."

Gen. Lew. Wallace was governor of the Territory of New Mexico from October 1, 1878, to May 19, 1881, and during this time would, at this rate, have been entitled to receive from the United States quarterly payments of \$875, with a payment for the last fractional quarter of his term of \$471.15, making the total amount \$9,221.15. He was paid at the rate of only \$650 per quarter—in all \$6,850. On June 25, 1881, General Wallace filed with the First Comptroller an account charging the United States with salary at the rate of \$875 per quarter during his incumbency of the governorship of the Territory; and crediting the account with the payments made at the rate of \$650 per quarter, and claiming a balance due him of \$2,371.15. The claimant was paid on the certificate of non-absence for each quarter required, in the practice of the accounting offices, under their construction of the provision of section 1884 of the Revised Statutes. His accounts against the United States were generally in the form following:

THE UNITED STATES	To LEW. WALLACE, <i>Dr.</i>
March 31, 1879. For services as governor of the Territory of New Mexico from the 1st day of January to the 31st day of March, 1879, inclusive, at the rate of \$2,600 per annum. . .	\$650 00

Please forward in payment of the above account, draft on designated depository at Santa Fé, New Mexico, to the address of Second National Bank, Santa Fé, New Mexico.

LEW. WALLACE.

The above account is correct and just, the service having been rendered, and the compensation being as therein stated.

LEW. WALLACE, *Governor.*

EXECUTIVE OFFICE,
Santa Fé, New Mexico, March 31, 1879.

On this and similar statements, the First Auditor examined and stated Governor Wallace's account for each quarter, upon which the First Comptroller certified the balance of \$650 due to the claimant, for which a draft was issued to his order by the Treasurer. This draft, when indorsed by Governor Wallace, became evidence of payment. He was not paid the full salary fixed by the Revised Statutes, because the appropriations were insufficient in amount to make such payment.

The act of June 19, 1878, making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year 1879, (20 Stats., 178, 194,) makes an appropriation for New Mexico as follows:

"For salaries of governor, chief justice, and two associate judges, at two thousand six hundred dollars each; secretary at one thousand

eight hundred dollars; and interpreter and translator in the executive office at five hundred dollars, twelve thousand seven hundred dollars."

The enacting clause of this act provides that the sums therein appropriated shall be "in full compensation for the service of the fiscal year ending June thirtieth, eighteen hundred and seventy-nine."

The appropriation act of June 21, 1879, (21 Stats., 23, 27,) continues the same provision with relation to the service for the fiscal year 1880, and appropriates for that year the same sums as in the preceding year for the officers named.

The act of June 15, 1880, making appropriations for the fiscal year ending June 30, 1881, (21 Stats., 210, 225,) appropriates—

"For salary of governor, two thousand six hundred dollars; chief justice, and two associate judges at three thousand dollars each," &c.

The enacting clause of this act also provides that the sums therein appropriated shall be "in full compensation for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-one."

Section 3 of the appropriation act of June 19, 1878, provides "that all acts or parts of acts inconsistent or in conflict with the provisions of this act are hereby repealed."

Upon these facts the question arises, whether General Wallace is entitled to the full annual salary of \$3,500, as provided by section 1845 of the Revised Statutes, while rendering service as governor of New Mexico.

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

The claim now presented cannot be finally disposed of until it has been passed upon by the First Auditor. (Bender's case, 1 Lawrence, Compt. Dec., 320; 15 Op. Att.-Gen., 140; McKnight *vs.* United States, 13 Ct. Cls., 299; McKee *vs.* United States, 12 Ct. Cls., 553.) The reasons against its allowance may, however, be stated, since they apply to other cases than that of General Wallace.

When the salary of an officer of the United States is fixed by law, and only a portion of it has been paid, because of the inadequacy of the appropriation made by Congress, he, nevertheless, has a claim valid in law for the residue unpaid. Having such claim, he can maintain an action for its recovery in the Court of Claims. (Graham's case, 1 Ct. Cls., 380; Major Collins' case, 15 Ct. Cls., 22; Briggs' case, *Id.*, 48; Fisher's case, *Id.*, 323; The Freedman's Bank case, 16 Ct. Cls., 19; French's case, *Id.*, 419.) The claim is one which he is entitled to have examined and considered by the accounting officers of the Treasury, who, if they find it just and valid, will report it to the Secretary of the

Treasury, to be by him reported to the Speaker of the House of Representatives for the consideration of Congress, pursuant to section 4 of the act of June 14, 1878. (20 Stats., 130.) For an examination of the purpose and effect of the provision contained in this section, reference may be had to Crocker's case, 1 Lawrence, Compt. Dec., 297, 300. The claimant in this case has a right to the benefit of this provision unless (1) he has in some way waived the right to receive the full amount claimed, or (2) unless the salary fixed by section 1845 of the Revised Statutes has been, for the years named, changed by law.

1. If the appropriation acts for those years had been in the usual form, the claimant's right to the full amount of the salary fixed by the Revised Statutes would not be waived by anything which he has done. Appropriation acts in the usual form do not declare the appropriations made therein to be "in full compensation for the service of the fiscal year" for which each provides. When a salary fixed by law has been paid only in part, and the right to the residue is undisputed, the acceptance of that part, even without protest or objection, does not constitute a waiver of the right to be paid the full amount. (Adams' case, 1 Ct. Cls., 306.) A debtor cannot discharge the whole of his admitted debt by paying a portion only of it. (2 Parsons, Cont., 6th ed., 618 and note, 686; Brooks *vs.* White, 2 Metcalf, 283; Warren *vs.* Skinner, 20 Conn., 559; Calkins *vs.* The State, 13 Wis., 440; Cumber *vs.* Wane, 1 Strange, 425; Heathcote *vs.* Crookshanks, 2 Term R., 24; Good *vs.* Cheeseman, 2 B. & Adol., 328; Fitch *vs.* Sutton, 5 East, 230; Acker *vs.* Phoenix, 4 Paige, 305; Boyd *vs.* Hitchcock, 20 Johns., 76, 78; Chitty, Cont., 747; 1 Smith's Lead. Cases, 249; 2 Greenl. Ev., 28; Reeside *vs.* United States, 2 Ct. Cls., 56, and authorities cited; Pinnell's case, 5 Reports, 117; Baird *vs.* United States, Dev. Ct. Cls., 188; United States *vs.* Adams, 7 Wall., 479, 480; United States *vs.* Childs, 12 *Id.*, 245; United States *vs.* Clyde, 13 *Id.*, 35; United States *vs.* Justice, 14 Wall., 549; Wilcox *vs.* United States, 7 Ct. Cls., 586.)

When, however, the amount of a claimant's demand is not clearly fixed by statute or otherwise, but is open to controversy, a payment made which was intended to be in full, and was accepted without protest, is a waiver of all further claim. (May *vs.* Le Claire, 11 Wall., 217; United States *vs.* Child, 12 Wall., 232; United States *vs.* Clyde, 13 Wall., 35; United States *vs.* Gurney, 4 Cranch, 333; Kirkham's case, 4 Ct. Cls., 223; Folsom's case, 4 Ct. Cls., 366; Kerchner *vs.* United States, 7 Ct. Cls., 579; Gilman's case, 8 Ct. Cls., 521; Comstock's case, 9 Ct. Cls., 141; The Hermon, 1 Lowell's Dec., 515.) If the payment of a part of a disputed claim be accepted, but the acceptance be accompanied with

a protest, the presumption of a compromise will thereby be negatived, and all rights as to the residue unpaid will be reserved. (*United States vs. Justice*, 14 Wall., 549.)

A party who accepts depreciated Treasury notes as money at par, in payment of his demand against the Government, waives all further claim. (*Buckhannan vs. Tinnin*, 2 How., 258; *Downey vs. Hicks*, 14 How., 240; *Gibbon's case*, 2 Ct. Cls., 421; *Tyer's case*, 5 Ct. Cls., 510; *Morrell's case*, 7 Ct. Cls., 422.)

The result of the adjudications on the question is, that where a claim is disputed, and the claimant accepts, without protest, less than is really due him in payment of the claim, this acceptance is regarded as in the nature of a compromise, and will be final.

2. If the appropriation acts for the years in which the claimant in this case rendered service as governor of New Mexico had not contained the provision making the sums therein appropriated "full compensation" for the services of those years, the acceptance by General Wallace of a sum less than that provided by the Revised Statutes for the salary of the office held by him would not have constituted a waiver of his right to the balance now claimed. The question whether a payment of a less sum than that claimed has been made or accepted in full satisfaction of the claim, depends upon the intention of the parties as determined by facts and the principles of law. The determination of the question will be reached "in the light of surrounding circumstances," from which the meaning and intention of the parties to the transaction will be gathered. (*Richey's case*, 1 Lawrence, Compt. Dec., 85, 96.) In the absence of the provision as to "full compensation" in the appropriation acts referred to, it would not be unreasonable to regard the action of the claimant in rendering his accounts and receipting payments as having been taken with reference to the sums appropriated by Congress, and not as the rendition of accounts for the full amounts thought to be due, and the receipting of payments for such amounts. The provision in question was, however, intended to suspend for those years section 1845 of the Revised Statutes, and it therefore deprived the claimant of the right which he would otherwise have had to the rate of compensation fixed by that section.

The claimant has, therefore, no valid claim to any part of the sum now demanded. (*Fisher's case*, 15 Ct. Cls., 323; 15 Op. Att.-Gen., 317; *Sholes vs. The State*, 2 Chand., 182; *Baxter vs. The State*, 9 Wis., 38; *Calkins vs. The State*, 13 Wis., 389; *Massing vs. The State*, 14 Wis., 502; *Simpson vs. Cushing, Id.*, 527.) He has received the full amount of salary which the law authorized for his office.

No right is lost, as in an action in court, by "splitting a claim" before an accounting officer. There are some officers of the United States whose salaries cannot be diminished during their continuance in office. (Const., art. II, sec. 1, cl. 6; art. III, sec. 1, cl. 1.) But where there is no constitutional inhibition, salaries may be diminished by law during such continuance. (*Butler vs. Pennsylvania*, 10 How., 402; *Territory vs. Pyle*, 1 Oreg., 151; *Koontz vs. Franklin*, 76 Pa. St., 156; *Patton's case*, 7 Ct. Cls., 362; *Fisher's case*, 15 Ct. Cls., 329; *Embry vs. United States*, 100 U. S., 680; 12 Stats., 355.) If there had been on the part of the claimant in this case a right to a larger salary than that provided for in the appropriation acts, the filing of the vouchers signed by him would not have operated as a waiver of his right to demand payment of the difference between the sum appropriated and that fixed by section 1845 of the Revised Statutes. In such case, if any doubt could exist, it would only go to the question of the right of the accounting officers to receive and examine the claim, or of the Secretary of the Treasury to report to the Speaker of the House of Representatives the amount found due, and would not affect the ultimate right of the claimant to go into the Court of Claims for relief. (Rev. Stats., 191, 1059.) If he had at any time a right to receive payment of the amount demanded, he would be entitled to relief on the ground that, in rendering his quarterly accounts for and acknowledging payment of his salary, he acted in ignorance of the extent of his rights.

When a party, in ignorance of his legal rights, accepts a smaller sum in discharge of a greater indebtedness legally due to him, he is entitled to relief. (*Cammack vs. Lewis*, 15 Wall., 643; *United States vs. Adams*, 7 Wall., 480.) In many States relief in equity is granted, where parties have acted under a misapprehension as to the law. The accounting officers of the Treasury may, on grounds of justice and legal right, properly recognize the right of a claimant who, by reason of the insufficiency of the amount appropriated by Congress, has received less than his full legal claim; especially since such recognition is not an allowance, and the claim must undergo the scrutiny and be subject to the action of Congress.

Even in the absence of such a provision in an appropriation act as that making the sums in the appropriation acts before referred to, the "full compensation for the service" of those fiscal years respectively, the claim to the rate of salary fixed by the Revised Statutes will not be valid as to all officers, without regard to the tenure of their offices.

There are many clerks whose appointment is authorized in the acts organizing the several Executive Departments. There are others whose appointment is authorized only in the annual appropriation acts.

When the appropriations made for the compensation of those appointed under such authority are exhausted, there is, really, no authority to continue the appointees in office; and, in such case, they are entitled to receive only such compensation as Congress may have appropriated for the services rendered by them. The annual appropriation acts are the sole measure of their rights to salary.

The sums appropriated by Congress to pay the salary of the governor of New Mexico for the fiscal years 1879, 1880, and 1881, are "in full compensation for the service" of those years respectively, and are in consequence the measure of General Wallace's rights to salary. Having been paid the amounts appropriated in these acts as the "full compensation" for his services as governor of New Mexico, his claim to the balance which would be due him at the rate of salary for that office fixed by section 1845 of the Revised Statutes cannot be allowed.

TREASURY DEPARTMENT,

First Comptroller's Office, July 8, 1881.

IN THE MATTER OF THE AUTHORITY OF THE SURGEON-GENERAL OF THE ARMY TO DISBURSE APPROPRIATION FOR FURNISHING ARTIFICIAL LIMBS AND APPLIANCES, OR COMMUTATION THEREFOR, TO OFFICERS, SOLDIERS, SEAMEN, AND MARINES.—ARTIFICIAL-LIMBS CASE.

1. The chief medical purveyor of the Army has, under the direction of the Surgeon-General, supervision of the purchase and distribution of the hospital and medical supplies for the Army.
2. The liability of sureties on bonds conditioned for the faithful discharge of these duties cannot, unless it be expressly stipulated therein, be extended to cover the duty of disbursing moneys for furnishing artificial limbs, or the commutation therefor, under the provisions of sections 4787 and 4788 of the Revised Statutes.
3. The duties of the chief medical purveyor and of the assistant medical purveyors pertain to the regular Army; while the persons entitled to artificial limbs, or commutation therefor, are, in most cases, soldiers or sailors who were "disabled during the war for the suppression of the rebellion," and the duty of disbursing moneys appropriated for furnishing such limbs or commutation is not a concomitant of any duty imposed by law upon the chief medical purveyor or any of the assistant medical purveyors.
4. The contract of a surety is to be construed strictly, and is not to be extended beyond the scope of its terms. To the extent, and in the manner, and under the circumstances pointed out in his obligation, the surety is bound, and no further. If he does not assent to any variation of the very terms of his contract, and a variation is made, it is fatal.

5. Section 4787 of the Revised Statutes authorizes the Surgeon-General of the Army to prescribe "regulations" for the supplying of artificial limbs and apparatus for resection to the persons entitled, under its provisions, to receive the same. Where regulations so prescribed conflict with the general provisions of law, they are not valid.
6. The authority given to the Surgeon-General in section 4787 to make regulations does not include the power to appoint an officer to act as *disbursing agent* for the purpose therein named.
7. Section 4789 makes it the duty of the Surgeon-General to certify to the Commissioner of Pensions a list of all soldiers who elect to receive money *commutation* instead of limbs or apparatus, with the amount due to each; and it provides that the *Commissioner of Pensions* shall cause the same to be paid to such soldiers "in the same manner as pensions are paid."
8. If this requirement as to the duty of the Commissioner of Pensions has not been repealed, it is unlawful to advance to an assistant medical purveyor of the Army, or to any other officer of the Department of War, moneys from the Treasury for the payment of the commutation provided for in section 4788.
9. The invalid pension appropriation act of March 23, 1876, (19 Stats., 8,) seems to have suspended this duty of the Commissioner of Pensions for the fiscal year ended June 30, 1877, and devolved it on the Surgeon-General of the Army.
10. In that act the item of \$50,000 for furnishing artificial limbs or apparatus for resection, with transportation or commutation therefor, was followed by the *proviso* "that the same shall be expended and disbursed under the direction of the Surgeon-General of the Army, and in accordance with existing laws."
11. The "existing laws" thus referred to in the proviso are the provisions embodied in sections 4778, 4779, and 4789 of the Revised Statutes, under which it is the duty of pension agents appointed by the President to disburse the moneys appropriated by Congress for the payment of pensions, and to give bond, with good and sufficient sureties, for such amount and in such form as the Secretary of the Interior may approve.
12. The allowance made for artificial limbs, &c., or commutation in lieu thereof, is a part of the *pension* granted by Congress to disabled soldiers; it is not assignable, nor is it liable to attachment, levy, or seizure, by or under any legal or equitable process whatever; and it cannot be set off by the Government in satisfaction of a sum due from the beneficiary thereof to the United States.
13. The provisions of the general pension laws, wherever applicable, must govern all transactions relative to the furnishing of artificial limbs, of apparatus for resection, or of commutation therefor, unless these provisions are *clearly* repealed or suspended by subsequent legislation.
14. There has been no express repeal or suspension of the provision of section 4789 of the Revised Statutes, requiring the Commissioner of Pensions to cause to be paid, to all soldiers who elect to receive it, money commutation, instead of limbs or apparatus, "in the same manner as pensions are paid."
15. The proviso in the act of 1876, (19 Stats., 8,) is not inconsistent with, but is expressly subordinated to the general and permanent provisions of the pension laws; and where there is a well-founded doubt as to whether the legislature

intended to suspend or repeal a permanent provision of law, the presumption is always against such suspension or repeal.

16. Since the close of the fiscal year 1877 the medical department of the Army has had no authority in law, either express or implied, to make any disbursement of the moneys appropriated by Congress for furnishing artificial limbs or apparatus for resection, with transportation or commutation therefor.
17. A provision in an appropriation act will have a general and permanent application to all future appropriations only when such an intention on the part of Congress is "*expressed in the most clear and positive terms*, and where the language admits of no other reasonable interpretation." (*Minis vs. The United States*, 15 Pet., 445.)
18. The circumstance that an appropriation follows, in an appropriation act, the caption "*MISCELLANEOUS OBJECTS UNDER WAR DEPARTMENT*," does not warrant the inference that a repeal of a permanent statute requiring such appropriation to be disbursed by an officer of another Department was intended by Congress.
19. The "*Estimates of Appropriations*" submitted by the heads of Departments to Congress cannot be referred to, in the construction of appropriation acts, as furnishing evidence of the intention of the legislature to abrogate the permanent provisions of law.
20. The First Comptroller, being charged with the duty of countersigning only those warrants for the advance or payment of money from the Treasury which are "*warranted by law*," has authority to examine into the legality of the advance or payment of such money.
21. The Secretary of the Treasury and the Comptroller, in granting warrants upon the Treasury, are both answerable for their legality. In this respect the Comptroller is a check upon the Secretary. But with regard to the *expediency* of an advance of money, the right of judging is exclusively in the head of the Department; the Comptroller has no voice in the matter.

The act of Congress of March 3, 1881, (21 Stats., 435,) "*making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for other purposes*," appropriates, under the caption of "*MISCELLANEOUS OBJECTS UNDER WAR DEPARTMENT*," \$175,000 "*for furnishing artificial limbs and appliances, or commutation therefor, and transportation*." (21 Stats., 447.) By appropriation warrant No. 349, the appropriation of which this sum composed an item was carried on the proper books of the Treasury Department to the credit of said appropriation for expenditure under the War Department.*

*The warrant is as follows:

<p>APPROPRIATION WARRANT, To the No. 349. WAR DEPARTMENT.</p>	<p>COMPTROLLERS AND REGISTER OF THE TREASURY: Congress having, by the hereinafter-mentioned act, made the appropriations thereunder specified, amounting to two million six hundred and sixty-six thousand nine hundred and seventy-seven dollars and one cent:</p>
---	---

The REGISTER is directed to cause this sum to be carried to the debit of the general account of appropriations, and the COMPTROLLERS and REGISTER are directed to

July 6, 1881, the Secretary of War made an "accountable requisition," No. 1002, duly countersigned, July 7, by the Acting Second Comptroller, and registered, July 8, by the Second Auditor, for \$20,000, "to be issued in favor of the Treasurer of the United States, to go to the credit of Lieutenant-Colonel Ebenezer Swift, assistant medical purveyor, United States Army, New York City, for which sum he is to be held accountable."

July 8, 1881, the Secretary of the Treasury granted accountable warrant No. 3,954, directing the Treasurer to "Pay to Treasurer U. S. for credit of Lt.-Col. Ebenezer Swift, assistant medical purveyor U. S.

credit each appropriation with the sum so appropriated, and for so doing this shall be your WARRANT.

[SEAL.] Given, in duplicate, under my hand and the seal of the Treasury Department, this first day of July, in the year of our Lord one thousand eight hundred and eighty-one, and of Independence the one hundred and fifth.

WILLIAM WINDOM,
Secretary of the Treasury.
July 23, 1881.

Received and registered July 25, 1881. Received, registered, and countersigned July 25, 1881.
J. L. D. W. P. TITCOMB, Assistant Register. J. TARBELL, Acting First Comptroller.
S. W. S.

By "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for other purposes."

Approved March 3, 1881. Public No. 67.

Artificial limbs, 1882.....	\$175,000 00
Total.....	<u>\$2,666,977 01</u>

The form of indorsement thereon is as follows:

APPROPRIATION WARRANT.

No. _____.

— DEPARTMENT,

For the fiscal year ending June 30, 187—.

NOTE.—The ORIGINAL of this Warrant will be filed in the office of the Register of the Treasury. The DUPLICATE will be sent by the Register to the Second Comptroller, who will forward it to the Department and Auditors interested in the appropriations, and the correctness of whose books and accounts requires that they should know the amounts and titles of appropriations thus officially rendered subject to their requisition and action. After the duplicate has been recorded in these offices, it will be returned to the Second Comptroller for file.

Recorded, and respectfully referred to the — Auditor for the information of his office.

_____,
Second Comptroller.

Recorded, and respectfully referred to the — Auditor for the information of his office.

_____, Auditor.

Recorded, and respectfully referred to the Secretary of — for the information of his Department and its Bureaus.

_____, Secretary.

Recorded, and respectfully returned to the Second Comptroller for file.

_____,
Secretary of —.

A., New York City, or order, to be charged to appropriation named in the margin ['1882, artificial limbs,'] twenty thousand dollars." This warrant was countersigned by the Acting First Comptroller. Subsequently, the attention of the Comptroller was called to this warrant, under which the money was advanced for disbursement, not by the Department of the Interior, as contemplated by section 4789 of the Revised Statutes, but by the War Department, under the supposed authority of a *proviso* contained in the appropriation act of March 23, 1876, (19 Stats., 8,) "making appropriations for the payment of invalid and other pensions of the United States for the year ending June thirtieth, eighteen hundred and seventy-seven." In that act there was appropriated, among other items of army pensions, for furnishing artificial limbs or apparatus for resection, with transportation or commutation therefor, fifty thousand dollars; and this item was followed by the *proviso* "that *the same* shall be expended and disbursed under the direction of the Surgeon-General of the Army, and *in accordance with existing laws*." In the absence of this *proviso*, the expenditure of the appropriation for 1877 would have been governed by section 4789 of the Revised Statutes, which is in these words:

"The Surgeon-General shall certify to the Commissioner of Pensions a list of all soldiers who elect to receive money commutation instead of limbs or apparatus, with the amount due to each, and the Commissioner of Pensions shall cause the same to be paid to such soldiers in the same manner as pensions are paid."

Upon this state of facts arose the questions, whether the warrant which was countersigned by the Acting First Comptroller was "warranted by law;" and whether the appropriation for the current fiscal year "for furnishing artificial limbs," &c., should not be disbursed in accordance with the provisions of section 4789 of the Revised Statutes.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

Lieutenant-Colonel Ebenezer Swift is a disbursing officer of the Medical Department of the Army of the United States, and gave bond,* as such, June 14, 1877.

* The bond is in the sum of \$20,000; it was executed on June 14, 1877, and approved by the Secretary of War June 23, 1877. Its condition is as follows:

"The condition of this obligation is such, that whereas the above-bounden Eben. Swift has been appointed assistant medical purveyor and lieutenant-colonel United States Army, and has accepted said appointment: Now if the said Lieutenant-Colonel Eben. Swift shall, and do at all times henceforth and during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully expend all public money, and honestly account for the same, and for all public property which shall or may come into his hands, in said capacity of lieutenant-colonel and assistant medical purveyor United States Army, without fraud or delay, then the above obligation to be void; otherwise, to remain in full force and virtue."

It appears that he has been, under the direction of the Surgeon-General of the Army, charged with the duties (1) of paying for artificial limbs supplied to persons entitled to receive the same under section 4787 of the Revised Statutes; and (2) of paying money commutation, instead of furnishing artificial limbs, to those who elect to receive the money value of such limbs, as provided in sections 4788 and 4790 of the Revised Statutes.

The duties of assistant medical purveyors are not fully and specifically prescribed or defined by statutes. The duties of the chief medical purveyor are prescribed in section 1173 of the Revised Statutes, which declares that he "shall have, under the direction of the Surgeon-General, supervision of the purchase and distribution of the hospital and medical supplies." Under section 1171, "the chief medical purveyor and the assistant medical purveyors may be assigned by the President to duty as surgeons, when not acting as purveyors." The duties referred to in these sections pertain to the *regular Army*, and it is for the performance of these duties that the purveyors' bonds are given. The liability of the sureties on such bonds cannot, unless it be expressly stipulated therein, be extended to cover the duty of disbursing moneys for furnishing artificial limbs, or the commutation therefor, under the provisions of sections 4787 and 4788 of the Revised Statutes; for, presumably, the persons entitled to such limbs or commutation are not in the military service of the United States. Most, if not all, of them are soldiers or sailors who were "*disabled* during the war for the suppression of the rebellion." The duty of disbursing *such* moneys is not a concomitant of any duty imposed by law upon the chief medical purveyor of the Army, or upon any of the assistant medical purveyors.

In the case of *The United States vs. Kirkpatrick*, 9 Wheaton, 732, Justice Story, delivering the opinion of the Supreme Court, held the true construction of an officer's bond to be: that the liability of the sureties was strictly confined to the duties and obligations created by the acts of Congress passed antecedent to the date of the bond. So in *Miller vs. Stewart* and others, 9 Wheaton, 680, 702, 703, it was held that the contract of a surety is to be construed strictly, and is not to be extended beyond the scope of its terms. "Nothing can be clearer," say the the court, "both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no farther. * * * He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of

law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. The class of cases which have been cited at the bar, * * * from Lord Arlington *vs.* Merrick, (2 Saund., 412,) down to that of Pearsall *vs.* Summersett, (4 Taunt., 593,) proceed upon the ground that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms." The decision in this case was referred to with approval in *The United States vs. Boyd* and others, 15 Peters, 208, 209; as was also the assertion of the same principle in *Farrar and Brown vs. The United States*, 5 Peters, 373, 389.

In the case of *The United States vs. Eckford's Executors*, 1 Howard, 261, 262, the Supreme Court reiterates its strong insistence upon the principle that the obligation of an officer's bond cannot be enlarged beyond its terms. In *The United States vs. Robertson*, 5 Peters, 659, 660, Chief Justice Marshall, delivering the opinion of the court, lays down the same principle, holding that "the obligation imposed by the bond itself is measured by its terms." In *The United States vs. Robert Tillotson*, 1 Paine's Circuit Court Reports, 320, 321, Justice Thompson says, in relation to the bonds of officers: "The general principles of law applicable to this class of cases are too well settled and understood to require authorities or illustration in their support. Sureties cannot be made responsible beyond the scope of their engagement. Any agreement between the creditor and principal, which varies essentially the terms of the contract, will exonerate them from their responsibility. Any new debt incurred, or the demand enlarged, or any act done to the injury and prejudice of the surety, will discharge him from all liability. These are undeniable and controlling rules, and universally admitted, both in courts of law and equity."

In *The United States vs. White et al.*, 4 Washington's Circuit Court Reports, 414, 417, in which it was *held* that the sureties in a bond given by J. S. to the Secretary of the Navy for the faithful execution of his agency in paying invalid pensioners were not answerable for his defaults in not paying the Navy and privateer pensioners, although J. S. had been duly appointed agent for the two latter duties, Justice Washington used this language: "Nothing can be more clear in law, in reason, and in justice, than that the sureties for his [J. S.'s] fidelity in paying away the money placed at his disposal by the Secretary of War to invalid pensioners are not his sureties for his faithful disbursement of moneys put into his hands by the commissioners of the Navy fund, or by the Secretary of the Navy, for the use of privateer pensioners. It forms no part of the engagement into which they entered. * * * A surety can never be bound beyond the scope of his engagement."

In *Ludlow vs. Simond*, 2 Caines' Cases, 57, 58, Chief Justice Kent, on behalf of the court, said: "It is a well-settled rule, both at law and in equity, that a surety is not to be held beyond the precise terms of his contract. * * * This rule is founded on the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life, the aid of one friend to another, in the character of surety or bail, becomes requisite at every step. Without these constant acts of mutual kindness and assistance, the course of business and commerce would be prodigiously impeded and disturbed. It becomes, then, excessively important to have the rule established that a surety is never to be implicated beyond his specific engagement. Calculating upon the exact extent of that engagement, and having no interest or concern in the subject-matter for which he is surety, he is not supposed to bestow his attention to the transaction, and is only to be prepared to meet the contingency, when it shall arise, in the time and mode prescribed by his contract. The creditor has no right to increase his risk, without his consent; and cannot, therefore, vary the original contract, for that might vary the risk."

In *Bartlett vs. The Attorney-General*, Parker's Reports, 277, the Barons of the Exchequer delivered their opinions *seriatim*, and unanimously held that a bond given as security for a collector of the customs did not extend to the collection by him of a duty upon coals which was imposed subsequently to the execution of the bond.

In *Stratton vs. Rastall*, 2 Term Reports, 370, Justice Buller said: "As against a surety, the contract cannot be carried beyond the strict letter of it."

The same principle governs the decisions in the following well-known cases, and in many others which need not be referred to: *Walsh vs. Bailie*, 10 Johns., 183; *King vs. Baldwin*, 2 Johns. Ch., 559-564; *United States vs. Corwine*, 1 Bond, C. C., 343; *Postmaster-General vs. Munger*, 2 Paine, C. C., 189; *Boulton vs. Stubbs*, 18 Vesey, 20; *Clifton vs. Walmsley*, 5 Term Rep., 564; *Dance vs. Girdler*, 4 Bos. & Pull., 41-43; *Wardens of St. Saviour's, Southwark, vs. Bostock*, 5 Bos. & Pull., 179.

In view of the rules and principles thus expounded, it is clear that, even if there were no other reason for arresting the advance of public moneys to Lieutenant-Colonel Swift, the want of proper security to the Government for the faithful expenditure and disbursement of such moneys would be an ample and conclusive reason for the First Comptroller's arresting the advance of money which would otherwise have been made upon the warrant which was erroneously countersigned by the deputy as Acting First Comptroller. Upon this ground alone, if

upon no other, the warrant was not, within the meaning of section 269 of the Revised Statutes, "warranted by law."

When a warrant issued for the advance or payment of money from the Treasury is submitted to the First Comptroller for his action thereon, the question arises whether the advance or payment is authorized by law. If the Comptroller be of the opinion that it is not so authorized, it is his duty to refuse to countersign the warrant. Alexander Hamilton, defending himself against a charge of having, when Secretary of the Treasury, violated the law in advancing salary to the President, says:

"As between the officers of the Treasury, I take the responsibility to stand thus: The Secretary and Comptroller, in granting warrants upon the Treasury, are both *answerable for their legality*. In this respect *the Comptroller is a check upon the Secretary*. With regard to the *expediency* of an advance, in my opinion the right of judging is exclusively with the head of the Department. The Comptroller has no voice in this matter. So far, therefore, as concerns *legality* in the issues of money while I was in the Department, *the Comptroller must answer with me*; so far as a question of expediency or the due exercise of discretion may be involved, I am solely answerable. And uniformly was the matter understood between successive Comptrollers and myself. Also, it is essential to the due administration of the Department that it should be so understood." (Hamilton's Works, vol. VII, p. 548.)

The duty of the Comptroller, in respect of such advances, has not been modified since the time of Hamilton. He must in all cases judge as to their legality.

Section 4787 of the Revised Statutes authorizes the Surgeon-General of the Army to prescribe "regulations" for the supplying of artificial limbs and apparatus for resection to the persons entitled, under its provisions, to receive the same. Regulations so prescribed cannot, if they conflict with the general provisions of law, be valid. The authority given to the Surgeon-General to make such regulations does not include the power to appoint an officer to act as *disbursing agent* for the purpose named in section 4787; because, unless the duty of making disbursements for specific objects pertains to an office, such duty can be imposed only under an appointment for that purpose by the head of the proper Executive Department. (Rev. Stats., 176, 1191, 3614, 3639, 3648.) Under the provisions of section 4789 of the Revised Statutes, the Surgeon-General is required to certify to the Commissioner of Pensions a list of all the persons described in section 4787 who elect to receive money commutation instead of limbs or apparatus, with the amount due to each; and the Commissioner of Pensions is required to cause the same to be paid to such persons "*in the same manner as pensions are paid.*"

If this requirement as to the duty of the Commissioner of Pensions has not been repealed, it is clearly unlawful to advance to the assistant medical purveyor, or to any other officer of the Department of War, moneys from the Treasury for the payment of the commutation provided for in section 4788. Until the commencement of the fiscal year 1877, artificial limbs and apparatus for resection were provided for in the acts making annual appropriations for invalid and other pensions. The sums appropriated for this purpose were disbursed under the direction of the Department of the Interior. (Rev. Stats., Title LVII—Pensions—secs. 4692–4791; acts of June 20, 1874, and March 1, 1875; 18 Stats., 115, 337.)

The estimate for appropriations “under the Department of the Interior” for the fiscal year ending June 30, 1877, as submitted by the Secretary of the Treasury for that year (H. R. Ex. Doc. No. 5, First Sess. 44th Cong., p. 115) calls for an appropriation of \$29,500,000 for “Army pensions,” including \$50,000 for artificial limbs and apparatus for resection, with transportation or commutation therefor. In this estimate, as well as in that for “Navy pensions” which follows, occur these words: “with a recommendation that the appropriation to pay for artificial limbs, or commutation therefor, be made separately to the Surgeon-General’s office.”

The pension appropriation act for that year appropriated the \$50,000 asked for, and in pursuance of this recommendation provided—

“That the *same* shall be expended and disbursed under the direction of the Surgeon-General of the Army, *and in accordance with existing laws.*”

A like provision in regard to furnishing artificial limbs, &c., to Navy pensioners, is contained in the same act, as to the sum therein appropriated. (19 Stats., 8.) Both provisions are in terms limited in their operation to the particular sums appropriated for the fiscal year 1877.

The *pension* appropriation act for the fiscal year ended June 30, 1878, made no provision for furnishing artificial limbs, apparatus for resection, or commutation therefor. (19 Stats., 223.) The appropriation for these objects was made in the sundry civil expenses act of March 3, 1877. (19 Stats., 344, 360.) This act appropriated \$100,000 for this purpose, but contained *no directions* as to the *mode* of its expenditure or disbursement. The act of the same date making appropriations to supply deficiencies for the fiscal year ended June 30, 1877, and prior years, (19 Stats., 363, 365,) appropriated \$212,947 for furnishing artificial limbs or appliances, or for commutation therefor, and for transportation. This item appears in the act under the caption “Office of the Surgeon-General.”

The acts of June 14, 1878, and January 27, 1879, respectively, making appropriations for pensions for the fiscal years ended June 30, 1879, and June 30, 1880, (20 Stats., 112, 266,) contained no appropriation for artificial limbs, apparatus for resection, or commutation therefor. The appropriations for these objects for the years named were made in the sundry civil expenses acts of June 20, 1878, and March 3, 1879. (20 Stats., 223, 389.) In both acts these appropriations were placed under captions and classed as coming under the War Department—"MISCELLANEOUS OBJECTS"—but without direction as to the manner of their expenditure.

The pension appropriation acts of January 13, 1880, and February 26, 1881, (21 Stats., 59, 350,) for the fiscal years ending respectively June 30, 1881, and June 30, 1882, make no appropriation for artificial limbs or commutation. The appropriations for these purposes for the said years were made in the sundry civil expenses acts of June 16, 1880, and March 3, 1881. (21 Stats., 259, 270, 435, 447.) Each appropriation for these purposes is in the statutes classed among the appropriations "under the War Department," and is without direction as to the manner of expenditure.

A pension is "A stated and certain allowance granted by the Government to an individual, or those who represent him, for valuable services performed by him for the country." (Bouvier's Law Dictionary.) The allowance for an artificial limb and apparatus for resection, or of commutation therefor, at stated periods, under section 4787 of the Revised Statutes, is clearly a pension, and comes under that title in the Revision. It is granted to "every officer, soldier, seaman, and marine, who was disabled, during the war for the suppression of the rebellion, in the military or naval service, and in the line of duty, or in consequence of wounds received or disease contracted therein;" and every such person is "entitled to receive a new limb or apparatus at the expiration of every five years." By section 4788, every such person is, if he shall so elect, entitled to "receive, instead of such limb or apparatus, the money value thereof." By section 4789, the Commissioner of Pensions shall cause such money value to be paid to such soldiers "in the same manner as pensions are paid." Undoubtedly, Congress intended that all the safeguards thrown around the grants of pensions to our disabled veterans should apply to its grant of artificial limbs, and to the commutation therefor.

The allowance made for artificial limbs, &c., or commutation in lieu thereof, is in itself a part of the *pension* granted by Congress to disabled soldiers. The grant comes within all the beneficial provisions of

the pension laws. (Rev. Stats., Title LVII.) The amount due the pensioner is not liable to attachment, levy, or seizure, by or under any legal or equitable process whatever, but inures wholly to his benefit. (Rev. Stats., 4747.) No demand, claim, or offset by any person, or even by the United States, can be set up against it. (2 Op. Att.-Gen., 310, 532; 3 Op., 135, 151; 4 Op., 366.)

The safeguards thrown around the grants of pensions to disabled soldiers were designed to secure in all cases to the grantees the enjoyment of these governmental bounties. The pensioner can no more deprive himself by an assignment of the benefit of the commutation for an artificial limb than he can deprive himself, by assignment, of any other part of his pension. The provisions of the general pension laws, wherever applicable, must govern all transactions relative to the furnishing of artificial limbs, of apparatus for resection, or of commutation therefor, unless these provisions are *clearly* repealed or suspended by subsequent legislation.

Bearing in mind the beneficial character and purpose of the legislation respecting pensions, it would be, in the absence of a clear and distinct legislative expression of such intention, in contravention of public policy and the will of Congress to hold, even under the proviso of the act of March 23, 1876, that the moneys appropriated for furnishing artificial limbs, &c., or commutation therefor, should be paid in any other manner than as pensions are paid; for the proviso itself says that the moneys "shall be expended and disbursed * * * *in accordance with existing laws.*"

What are the "existing laws" there referred to? They are the provisions embodied in sections 4778, 4779, and 4789 of the Revised Statutes. Under these laws the officers whose duty it is to disburse the moneys appropriated by Congress for the payment of pensions are designated pension agents, and are required to give bond, with good and sufficient sureties, for such amount and in such form as the Secretary of the Interior may approve. It would be a palpable violation of the spirit and purpose of the pension laws to advance to an assistant medical purveyor of the Army for disbursement any part of the moneys which these laws expressly require to be disbursed by duly appointed and sufficiently bonded pension agents. The liability of sureties on official bonds is controlled mainly by express law, and in such case the terms of the liability cannot, as has been already shown, be extended by implication. It is evident in the present case that the official bond of the assistant medical purveyor does *not* cover disbursements of any pension money, or of any money which is directed by statute to be paid

in the same manner as pensions are paid; while there can be no doubt that the official bond of the pension agent is responsible for the faithful disbursement of such money. Under these circumstances it would seem to be highly improper to advance to the assistant medical purveyor the money called for by the requisition of the War Department.

Under the general pension laws it was the duty of the Commissioner of Pensions (1) to provide and furnish to the disabled soldiers entitled thereto, under such regulations as have been, or may be, prescribed by the Surgeon-General of the Army, (Rev. Stats., 4787,) or by the Secretary of the Interior, (*Id.*, 471,) artificial limbs and apparatus for resection; and (2) to cause commutation therefor to be paid to such soldiers when they so elect, and the Surgeon-General has certified the amount due. Section 471 of the Revised Statutes declares that "The Commissioner of Pensions shall perform, under the direction of the Secretary of the Interior, such duties in the execution of the various pension * * * laws as may be prescribed by the President." The Surgeon-General of the Army can prescribe no duty to the Commissioner of Pensions in this matter beyond that relating to the furnishing of artificial limbs or apparatus for resection.

The authority conferred upon the Surgeon-General by the *proviso* in the appropriation act of March 23, 1876, (19 Stats., 8,) for the fiscal year ended June 30, 1877, to direct the expenditure and disbursement of the sum then appropriated for artificial limbs, was not renewed in any subsequent appropriation act. That *proviso* was, in departmental practice, construed as *suspending* the operation of section 4789 of the Revised Statutes; but the soundness of this construction may well be doubted; for the *proviso* expressly limits the jurisdiction of the Surgeon-General as to the direction of the expenditure and disbursement of the money to such direction as may be given "*in accordance with existing laws.*" The act of 1876 appropriated \$50,000 for artificial limbs, &c., for the fiscal year ending June 30, 1877, and provided that "*the same shall be expended and disbursed under the direction of the Surgeon-General of the Army, and in accordance with existing laws.*"

The Revised Statutes were designed to be, as far as practicable, a permanent body of laws. Section 4789 requires the Commissioner of Pensions to cause the commutation money to be paid "in the same manner as pensions are paid." This direction is in force unless it has been suspended for a time or absolutely repealed. There is no statute which in *express terms* suspends for any year the operation of, or repeals *in toto*, this section. It is well settled that such repeal or suspension by *implication* is not favored in law. It is not clear that the *proviso* in

the appropriation act of 1876 was *intended* to operate as a suspension, for the fiscal year 1877, of the provision of section 4789 imposing upon the Commissioner of Pensions the duty of causing the money commutation, instead of limbs or apparatus, to be paid to disabled soldiers "in the same manner as pensions are paid;" while it is clear that the proviso does not on its face indicate such a purpose, but rather the contrary, inasmuch as it requires that "the direction of the Surgeon-General of the Army" as to the expenditure and disbursement of the sum appropriated shall be "in accordance with existing laws;" i. e., the laws which require the money to be paid to the intended beneficiaries "in the same manner as pensions are paid."

Where there is a well-founded doubt as to whether the legislature intended to suspend or repeal a permanent provision of law, the presumption is always against such suspension or repeal.

In an elaborate and well-considered opinion of Hon. H. F. French, Assistant Secretary of the Treasury, under date August 26, 1878, (quoted with approval in Crocker's case, 1 Lawrence, Compt. Dec., 300, 301,) it is said, in reference to a question exactly analogous to that now under consideration—namely, whether a permanent provision of law was repealed by implication by a *proviso* in an appropriation act which contained no words of repeal:

"The construction that said section 4 [of the act of Congress of June 14, 1878, 20 Stats., 130] repeals the limitation as to the time of presenting claims is inconsistent with the well-known principles of law which govern this subject. If Congress had intended to enlarge for five years the time in which all claims under appropriations, the balances of which had been exhausted or carried to the surplus fund, might be presented, and thus to repeal the limitation for presentment of claims which attaches to nearly all appropriations by Congress, we should surely find in the statute some express provision for the repeal of such limitation; but we do not find any or even a general clause repealing all provisions of former statutes inconsistent with this act.

"It is a well-settled principle of law that a statute is not repealed by implication unless there be such a *positive repugnancy* between the provisions of the new law and the old that they cannot stand together or be consistently reconciled. (Potter's Dwarries on Statutes, page 155, note 4; McCool vs. Smith, 1 Black's U. S. Rep., page 470.)"

The word "same" in the first proviso of the appropriation act of 1876 can at most refer only to the money appropriated in that act, (Smythe vs. Fiske, 23 Wall., 374, 381;) and it has been construed, in the administration of the Department, to relate only to the money appropriated for artificial limbs. In strictness, the proviso would apply to the *whole* of the appropriations preceding it, not merely to the immediately preceding item for artificial limbs, &c.; and the authority of the Surgeon-General to disburse all the Army and Navy pensions for the fiscal year

ended June 30, 1877, would stand on the same foundation as his authority to disburse the \$50,000 appropriated for furnishing artificial limbs or apparatus for resection, with transportation or commutation therefor. The act from which it is taken is not and does not profess to be permanent legislation. It has no words which could fairly be so construed. Permanent legislation in an appropriation act will not arise by implication; it can arise only by express terms. It is not to be favored. (Geological-Survey case, *ante*, 133, 134.) The proviso in question is not necessarily in conflict with the general law; and it can, by its own terms, have effect only in so far as it is "in accordance with existing laws." It might well be doubted whether even for the fiscal year ended June 30, 1877, this proviso imposed upon the Surgeon-General any other duty than that of certifying, under regulations by him prescribed, a list of the persons who had elected to receive the commutation money. (Rev. Stats., 4787, 4789.) The proviso is, that the money shall be expended and disbursed "*unâer the direction* of the Surgeon-General," not *by* him or by any of his subordinate officers. It is only by a very free construction that such "direction" could have been held to include authority in the Surgeon-General to commit the actual expenditure and disbursement to an assistant medical purveyor of the Army.

The "existing laws" referred to in the proviso required that the money should be advanced only to properly-qualified disbursing officers. (Rev. Stats., 176, 3614, 3639, 3648.) As already stated, however, this proviso has, in practice, been construed as authorizing the Surgeon-General to designate an officer to disburse the money appropriated for furnishing artificial limbs, &c.; and the assistant medical purveyor so designated has disbursed it. This practice has been followed since June 30, 1876.

Whatever warrant there may have been for this mode of disbursing the sum appropriated for the fiscal year 1877, it is clear that the medical department of the Army has, since the disbursement of that sum, had no authority in law, either express or implied, to make any disbursement of the moneys subsequently appropriated for that purpose. No subsequent appropriation act authorized the least departure from the course prescribed by the general provisions of law.

The proviso in the act of March 23, 1876, (19 Stats., 8,) cannot, by the most liberal construction, extend further than to transfer from the Commissioner of Pensions *for one year* a duty imposed upon him by general law, and devolve it, for that period, on the Surgeon-General of the Army. To construe the proviso as conferring on the Surgeon-General exclusive jurisdiction over the entire disposition of the sum appro-

priated for furnishing artificial limbs, &c., it is necessary to violate the fundamental rules for the construction of statutes.

It is well settled that provisions made in appropriation acts, which refer to the particular appropriation made therein, cannot, by implication, be construed as working a repeal of general laws, or as extending in their application beyond the time covered by the appropriation act, or to any objects other than those to which such provisions expressly relate.

In the case of *Minis vs. The United States*, 15 Peters, 445, to which the present case is exactly analogous, as in both cases a proviso in an appropriation act was construed, in departmental practice, as permanent in its operation, the Supreme Court, in deciding that such was not the true construction, and that the proviso in question was "limited exclusively" to the particular appropriation to which it referred, said :

"It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation, any provision which was to *have a general and permanent application* to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, *unless it is expressed in the most clear and positive terms*, and where the language admits of no other reasonable interpretation. * * * A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment."

A permanent fiscal system has, by the general laws, been established for the collection, safe-keeping, and disbursement of the public moneys; and in this system provisions are made for directing and controlling the manner of advancing and disbursing public moneys appropriated for the payment of pensions. Innovations or modifications of this system can be made only by direct legislation, or by enactments of a permanent nature, which are clearly repugnant to some particular feature or provision of what might be termed the organic laws of the fiscal system of the Government.

The mere classification, in an annual appropriation act, of an item of expense as coming under a different Department than that which, by permanent provision of law, has jurisdiction of the subject-matter of such item, cannot, in the absence of express intention or clearly manifested purpose on the part of Congress to transfer the jurisdiction from the one Executive Department to the other, and to repeal the law establishing the previous jurisdiction, safely or reasonably be regarded or construed as effecting such transfer and repeal, nor even as effecting a suspension for the period covered by the appropriation, of the permanent provision. Sedgwick says (Stat. and Const. Law, 205) "the tendency of all our modern decisions is to the effect *that the intention*

of the legislature is to be found in the statute itself, and that there only the judges are to look for the mischiefs meant to be obviated, and the remedy meant to be provided." This is the doctrine of the Supreme Court of the United States. (*Schooner Paulina's Cargo vs. United States*, 7 Cranch, 60; *L. L. & G. R. R. Co. vs. United States*, 92 U. S., 751.) It is also the settled doctrine in England. (*Notley vs. Buck*, 8 Barn. & Cres., 160, 164; *Brandling vs. Barrington*, 6 Barn. & Cres., 467, 475; *The King vs. Inhabitants of Stoke Damerel*, 7 Barn. & Cres., 563, 568, 569.)

In the case under consideration the general law places the whole matter of actual disbursement of appropriations for artificial limbs, apparatus for resection, and commutation therefor, primarily in the Commissioner of Pensions, under the direction of the Secretary of the Interior, subject to such regulations as are proper to be made therefor by the Surgeon-General of the Army. In default of an express or necessarily implied repeal of the general law on this subject, no money can be lawfully advanced for these objects to an assistant medical purveyor of the Army. The sum appropriated for them is a part of the pension money remaining in the Treasury. It has been shown that the bond of the purveyor would not be liable for the disbursement of moneys which the law expressly directs to be paid out "in the same manner as pensions are paid." No official can authorize such moneys to be disbursed in any other manner; such authority can be given only by Congress, and it must then be given in unmistakable terms.

Before the appropriation act of March 23, 1876, went into effect, the moneys appropriated for artificial limbs, apparatus for resection, and commutation therefor, were paid out by the proper disbursing officers of the pension funds, namely, the *pension agents*. The disabled soldier entitled to an artificial limb generally selected it of any manufacturer or dealer in such articles; then, upon sufficient evidence, and certificate of the Surgeon-General in the matter, the proper local pension agent, under the direction of the Interior Department, paid the bill in the prescribed amount. This manner of payment would appear to be a just, convenient, and proper one; and, so far as known, no valid objection to a return to it in practice has been adduced.

The heads of the several Executive Departments are required to submit annually to Congress estimates of the expenditures required in their respective Departments during the fiscal year next approaching. (Rev. Stats., 3660-3668.) These estimates are to be submitted through the Secretary of the Treasury, and are to be included in a book of estimates prepared under his direction. (*Id.*, 3669.) In communicating

their estimates the heads of Departments are required (1) to specify as nearly as may be convenient the sources from which such estimates are derived; (2) to give the calculations on which they are founded; (3) to discriminate between such estimates as are conjectural in their character, and such as are framed upon actual information and applications from disbursing officers; (4) to give reference to any law or treaty by which the proposed expenditures are respectively authorized; and (5) to set forth each particular item of expenditure. Sections 3678 and 3679 provide that the sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others; and that no Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations. Section 3673 provides that all moneys appropriated for the use of the War and Navy Departments shall be drawn from the Treasury by warrants of the Secretary of the Treasury upon the requisitions of the Secretaries of those Departments, respectively.

The Secretary of the Interior, assuming that the appropriation act of March 23, 1876, (19 Stats., 8,) permanently transferred the duty of furnishing artificial limbs and commutation therefor from the Interior Department (Commissioner of Pensions) to the War Department (Surgeon-General of the Army), omitted, after the passage of the act, the item therefor from his annual estimates; the Secretary of War included it in *his* annual estimates; and Congress appropriated this part of the moneys due to pensioners among items of expenditure under the War Department.

There is no express law which classifies the various items that belong to the expenditures of the respective Executive Departments; but the language of section 3665 is plainly to the effect that the head of each Department should include in his annual estimate the items of expenditure which are by law authorized in his Department. The payment of pensions is an item of expenditure of which the Interior Department has jurisdiction; and the head of that Department is in contemplation of law charged with the duty of submitting to Congress an annual estimate therefor.

The annual estimates of the War Department for each fiscal year since June 30, 1877, ask for appropriations for artificial limbs, &c., under the caption "*Miscellaneous Objects.*" ("Estimates of Appropriations," 1878, page 160; 1879, page 160; 1880, page 161; 1881, page 169;

1882, page 170.) The appropriations by Congress for these years follow the same order of arrangement as that made in the estimates referred to; but the acts making them contain no provisions or directions which would conflict with, modify, or repeal any section or provision of the pension laws. (Rev. Stats., Title LVII.) The only support of the notion that Congress intended to place the disbursement of moneys for artificial limbs, and commutation therefor, under the control of the War Department, is to be derived from this order of arrangement in the appropriation acts and estimates; and this is a totally insufficient foundation on which to base an implication of the repeal of a permanent provision of law. That the order of arrangement of the items in appropriation acts is not intended to furnish a rule of construction for the ascertainment of the proper Department or officer to be charged with the expenditure and disbursement of the moneys appropriated therein, is conclusively shown by many general appropriation acts. In the act of March 3, 1873, (17 Stats., 530, 541,) for example, none of the following items pertain to the "DEPARTMENT OF JUSTICE," although they are classed under that caption:

For pay of certain members of Congress; pay of bearer of contesting electoral vote of Louisiana; reimbursement of the Sergeant-at-Arms of the House of Representatives; purchase of site for, and commencement of construction of, a building to be used as a custom-house, &c.; purchase of a lot of ground at Indianapolis, Indiana; and salaries of Deputy Commissioner of Pensions and other pension officers.

Similarly, in the act of March 3, 1879, (20 Stats., 377, 384,) are found incongruously placed under the head "POST-OFFICE AND COURT-HOUSE, NEW YORK," items of appropriation for plans of public buildings; suppression of counterfeiting and other crimes; compensation in lieu of moieties; salaries and travelling expenses of agents at seal-fisheries in Alaska; and many others which have no relation whatever to the "POST-OFFICE AND COURT-HOUSE, NEW YORK."

The estimates and their classification or arrangement are not admissible as evidence in the ascertainment of the intention of Congress. Where a statute is plain and unambiguous no resort can be had to extrinsic facts for its interpretation. (*Bartlett vs. Morris*, 9 Porter, Ala., 266.)

The Supreme Court of Pennsylvania decided, in the case of *The Bank of Pennsylvania vs. The Commonwealth*, (7 Pa. St., 144,) that the *proclamation* and *message* of the Governor, the *journal* of the House of Representatives, and the *reports* of committees cannot be referred to in the construction of statutes for the ascertainment of the intention of

the legislature. "The journals are not evidence," say the same court in a more recent case, "of the meaning of a statute; because this must be ascertained from the language of the act itself, and the facts connected with the subject on which it is to operate." (*The Southwark Bank vs. The Commonwealth*, 26 Pa. St., 446.) "It is only as to the fact of the enactment of a law or one connected with its passage that the journals can be referred to." (*Id.*) The debates in Congress on any measure of legislation are not regarded as proper evidence of the purpose of a statute. (*Aldridge et al. vs. Williams*, 3 How., 24; *Leese vs. Clark*, 12 Cal., 387, 425; *Taylor vs. Taylor*, 10 Minn., 107; 6 Op. Att.-Gen., 464.)

If the *intention* of Congress cannot be sought for in the debates of that body, or in its journals, or in the reports of its committees, there can be no warrant for seeking it in the reports or estimates submitted by the head of an Executive Department.

Where Congress has intended that such estimates, or other extrinsic facts, should be consulted in the construction of appropriation acts, it has signified that intention in express terms; as, for example, in the act of July 14, 1862, (12 Stats., 564,) where it is provided, "That hereafter no salaries shall be paid to any employé in any of the navy-yards except to those designated in the estimates;" and in the act of March 3, 1879, (20 Stats., 417,) in which it is provided as to the appropriations for the general expenses of the government of the District of Columbia that they should "be expended in accordance with the estimates of the Commissioners of said District, approved by the Secretary of the Treasury." The rule that extrinsic facts cannot be referred to in statutory construction is in these acts expressly excluded from operation. "Every exception that can be accounted for is so much a confirmation of the rule that it has become a maxim, *Exceptio probat regulam*." (3 Term R., 722.) The legislature will not be presumed to have done a vain and useless thing in authorizing, in such cases, a reference to the estimates. If without this authority they could properly have been referred to, Congress *did* a vain and useless thing. (*Naz. Lit. and Ben. Inst. vs. Commonwealth*, 14 B. Monroe, 266.) An appropriation is valid without any estimate having been submitted to Congress therefor; and the location of an item in an appropriation act under a particular heading cannot repeal a statute controlling in express terms the mode of expending the appropriation.

The appropriation of \$175,000 for "furnishing artificial limbs and appliances, or commutation therefor, and transportation," contained in the act of Congress of March 3, 1881, "making appropriations for sun-
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dry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for other purposes," (21 Stats., 435, 447,) should, therefore, be entered on the proper ledgers as for the Pension Office, instead of the Surgeon-General's Office. The appropriation, although entered on the books of the Treasury Department as for expenditures under the War Department, can, by "transfer appropriation warrant," be entered for expenditure under the Interior Department. This transfer will be necessary, because the accounts of pension agents go to the Third Auditor, while those of the Surgeon-General go to the Second Auditor for examination and statement. There is no authority to advance any money from the Treasury of the United States for the purpose set forth in War-Department requisition No. 1002, namely, to go to the credit of Lieutenant-Colonel Swift, assistant medical purveyor United States Army, New York City, and to be charged to the appropriation for artificial limbs. The amount of this appropriation may, however, lawfully be advanced to duly-qualified pension agents, whose duty it is to disburse all moneys appropriated for this purpose "in the same manner as pensions are paid." (Rev. Stats., 4789.) The adoption of the course here recommended, and the refusal by the First Comptroller to approve of any further advance of money from this appropriation to the medical disbursing officer, need not interfere with any proper contract entered into for supplying the artificial limbs, or apparatus for resection; as the question raised by the warrant for an advance of \$20,000 to Lieutenant-Colonel Swift for this purpose relates only to the legality of advancing any money out of the appropriation to a particular officer, and to the authority of another designated officer to direct or control the expenditure of the appropriation.

The First Comptroller is charged with the duty of countersigning only those warrants which are "warranted by law." Necessarily, therefore, he must have authority to examine into the legality of the advance or payment of public money from the Treasury on warrants drawn therefor. (Bender's case, 1 Lawrence, Compt. Dec., 338, 347-349, 391, 549-559.) The Secretary of the Treasury and the Comptroller, in granting warrants upon the Treasury, are both answerable for their legality. In this respect the Comptroller is a check upon the Secretary. But with regard to the *expediency* of an advance of money, the right of judging is exclusively in the head of the Department; the Comptroller has no voice in the matter. (1 Lawrence, Compt. Dec., 547.)

The Secretary of the Treasury will be advised to notify the Secretary of War and the Secretary of the Interior of the opinion herein given

as to the illegality of the warrant, and of the advance made thereon; and also to advance from the appropriation in question such moneys as may be required on the requisition of the Secretary of the Interior. No warrant issued on the requisition of the War Department for any unexpended portion of this appropriation can be lawfully countersigned by the First Comptroller. The draft for \$20,000 having been issued in favor of Lieutenant-Colonel Swift as assistant medical purveyor, but not delivered to him by the Treasurer, the latter officer should be directed to deposit the amount of the draft in the name of the payee to the credit of the appropriation against which the warrant upon which it was issued was drawn, in order that the proper credit may be given in the settlement of Lieutenant-Colonel Swift's accounts against the amount of the warrant with which he stands charged, on the books of the Treasury Department, for artificial limbs, &c. The necessary changes in the appropriation ledgers and the disposition of the draft which are here recommended can be made by the written directions of the Secretary of the Treasury and the First Comptroller.*

TREASURY DEPARTMENT,

First Comptroller's Office, July 26, 1881.

* Since the writing of this opinion, the Supplement to the Revised Statutes of the United States has been published. This supplement has been prepared and edited by the Hon. William A. Richardson, one of the judges of the Court of Claims, and sometime Secretary of the Treasury. It embraces the statutes, general and permanent in their nature, passed after the Revised Statutes; that is, all of the legislation of the years 1874-1881, which is still in force.

By reference to pages 247, 248, and 278, of the Supplement, it will be seen that, in the judgment of the learned reviser, the *proviso* in the appropriation act of March 23, 1876, (19 Stats., 8,) that the sum appropriated in that act should be "expended and disbursed under the direction of the Surgeon-General of the Army," applied only to that particular appropriation, and wrought no modification or repeal, as to any subsequent appropriation for artificial limbs or commutation, of the provisions contained in section 4789 of the Revised Statutes. As a further proof of the distinguished reviser's conviction that section 4789 is in full force, and nowise displaced by the proviso of 1876, it may be mentioned that in the list, given in the Supplement, of the sections of the Revised Statutes which have been "altered, affected, or repealed by legislation" since the Revised Statutes went into effect, section 4789 is not to be found. It is therefore, according to the high authority cited, *not* "altered, affected, or repealed" by the proviso in question.

An opinion of the Attorney-General of October 22, 1881, on the subject above considered by the Comptroller, has been published. It is believed that the view taken by Judge Richardson and the Comptroller is correct, notwithstanding the opinion of the Attorney-General to the contrary. The views of the Attorney-General have been considered at length in the Appendix to 1 Lawrence, Compt. Dec., 553-559.

In the "Sundry Civil" appropriation act approved August 7, 1882, the item for furnishing artificial limbs and appliances, &c., for the fiscal year ending June 30, 1883, is required "to be disbursed under the direction of the Secretary of War."

IN THE MATTER OF THE DISBURSEMENT OF THE COMPENSATION OF THE MEMBERS, OFFICERS, CLERKS, AND EMPLOYÉS OF THE SENATE, PENDING THE VACANCY IN THE SECRETARYSHIP.—SENATE-DISBURSEMENT CASE.

1. The right of Senators, Representatives, and Delegates in Congress to receive "at the end of each month" the compensation or salary then due is absolutely fixed by law; and the proper appropriation has been made for the fulfillment of this public engagement.
2. There are two modes of discharging the financial liabilities of the United States when appropriations are made therefor: (1) By the settlement and adjustment of an account pursuant to section 236 of the Revised Statutes; and (2) *without* the settlement and adjustment of an account between the United States and the claimant or creditor.
3. Section 236 provides that "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."
4. Where there is no disbursing officer charged (1) by statute, or (2) by authorized regulations, or (3) by appointment under incidental authority, with the duty of making payment of public moneys to a creditor of the United States, or claimant of moneys in the Treasury, such creditor or claimant has a right to present his claim or demand to the proper accounting officers of the Treasury for adjudication and payment.
5. In such case, unless otherwise provided, the First Auditor states and settles an account, and the balance found due to the creditor or claimant is, when certified by the First Comptroller, paid by the Treasurer of the United States, either in money or by draft, upon a warrant drawn by the Secretary of the Treasury and countersigned by the Comptroller. This is the general mode of paying the public liabilities. It applies as well to the compensation of Senators, Representatives, and Delegates in Congress as to other claims and demands against the United States.
6. Section 3648 of the Revised Statutes provides that "it shall be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be *necessary* to the faithful and prompt discharge of their respective duties, and to the *fulfillment of the public engagements*."
7. Though the Secretary of the Senate and the Clerk of the House of Representatives were, by the act of February 23, 1815, (3 Stats., 412, ch. 51,) made disbursing officers of the *contingent* fund of their respective Houses, it was not until the passage of the act of February 10, 1854, (10 Stats., 267, carried into sections 56 and 57 of the Revised Statutes,) that the Secretary of the Senate was made the disbursing officer of the *compensation* of the members and officers of that body, as well as of its contingent fund.
8. The provisions of law relative to the disbursement of compensation due to the members, officers, &c., of the Senate are *remedial* in their nature, and are to be construed liberally, the true rule being to give such construction as shall "add

force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*.”

9. Every reason applicable to the construction of remedial statutes conferring jurisdiction on courts will apply with equal force to similar statutes giving executive jurisdiction; and the maxim *Est boni judicis ampliare jurisdictionem* has equal application to the case of executive or quasi-judicial officers exercising authority remedial in its nature.
10. The present case does not disclose a *casus omisus*. The provisions of law for the appointment of disbursing officers were designed to furnish aids to the Treasury Department in the performance of its duty of fulfilling the public engagements, and not to interpose obstacles to such performance. The extensive powers of the Secretary and Treasurer are amply sufficient to meet the necessities of the case.
11. Section 161 of the Revised Statutes authorizes the head of each Executive Department to “prescribe regulations, not inconsistent with law, for the government of his Department, * * * the distribution and performance of its business * * *;” and section 248 provides that the Secretary of the Treasury shall, from time to time, “grant * * * all warrants for moneys to be issued from the Treasury in pursuance of appropriations by law;” and “generally perform all such services relative to the finances as he shall be directed to perform.”
12. Application to the present case of the principle that “whenever anything is authorized, and especially if, as a matter of duty, required by law to be done, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment.”
13. The Treasurer of the United States is the chief disbursing officer of the Government. He is required by section 3639 of the Revised Statutes, when ordered by the proper Department or officer of the Government, to make such payments and perform such other duties as fiscal agent of the Government as may be imposed upon him by law, or by regulations of the Treasury Department made in conformity to law. In the discharge of these duties, section 3644 provides that all moneys paid into the Treasury of the United States shall be subject to his draft, and section 3593 includes within this jurisdiction all public moneys paid into any depository.
14. The construction given to section 3648, as settled by long usage, is that no special direction of the President as to each advance is required, but that a special order from him applicable to a class of, or to all, cases is a sufficient compliance with the statute. Under the authority of the comprehensive terms of the order of President Grant, under date March 11, 1869, and of the general provisions of law, the Secretary of the Treasury on the 1st of August, 1881, pursuant to the advice of the First Comptroller, directed that advances be made to the Treasurer for the payment each month, during the vacancy in the secretaryship of the Senate, the compensation of the members, officers, &c., of that body.
15. There is no authority for stating with the financial clerk of the Senate accounts for the disbursement of the compensation of its members, officers, clerks, and employés; and the Senate cannot by resolution confer on any of its officers, other than a duly elected and qualified Secretary, authority to make such disbursements.
16. The Treasurer of the United States has been instructed to make monthly payments of the compensation of the members, officers, clerks, and employés of the

Senate, in the mode directed by the Secretary of the Treasury, and to render his accounts for such disbursements in the usual form. Should it become necessary, he will be authorized to disburse also the contingent fund of the Senate, under the limitation imposed by section 76 of the Revised Statutes, and conformably to the construction regarding the disposition of that fund which has been given in the "Special-Session case," *ante*, 78, 83.

Hon. John C. Burch, Secretary of the Senate of the United States, died on July 28, 1881.

Mr. R. B. Nixon, financial clerk of the Senate, addressed to the First Comptroller, under date August 1, 1881, a letter asking advice as to the method which, until the election of a Secretary, should be pursued in making monthly payments of compensation to Senators and to the officers, clerks, and employés of the Senate.

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OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

The right of Senators to compensation, and also to a regular monthly payment thereof, is fixed by law.

The act of July 28, 1866, (14 Stats., 323, sec. 17,) provides "that the compensation of each Senator, Representative, and Delegate in Congress shall be five thousand dollars per annum * * *." (See act January 20, 1874, 18 Stats., 4.) The Revised Statutes provide—

"SEC. 39. Each member and delegate, after he has taken and subscribed the required oath, is entitled to receive his salary at the end of each month.

"SEC. 40. The Secretary of the Senate and Sergeant-at-Arms of the House, respectively, shall deduct from the monthly payments of each member or delegate the amount of his salary for each day that he has been absent from the Senate or House, respectively, unless such member or delegate assigns as the reason for such absence the sickness of himself or some member of his family.

"SEC. 41. When any member or delegate withdraws from his seat and does not return before the adjournment of Congress, he shall, in addition to the sum deducted for each day, forfeit a sum equal to the amount which would have been allowed by law for his traveling expenses in returning home; and such sum shall be deducted from his compensation, unless the withdrawal is with leave of the Senate or House of Representatives respectively.

"SEC. 45. The compensation of Senators, Representatives, and Delegates, as prescribed in section thirty-five, shall be in lieu of all pay and allowance, except actual individual traveling expenses from their homes to the seat of Government and return, by the most direct route of usual travel, once for each session of the House to which such Senator, Representative, or Delegate belongs, to be certified under his hand to the disbursing officer and filed as a voucher.

"SEC. 47. The salary and accounts for traveling expenses in going to and returning from Congress of Senators shall be certified by the Pres-

ident of the Senate, and those of Representatives and Delegates by the Speaker of the House of Representatives.

"SEC. 48. The certificate given pursuant to the preceding section shall be conclusive upon all the Departments and officers of the Government.

"SEC. 52. The following persons are employed in the service of the Senate:

"One *Secretary of the Senate*, at a salary of five thousand dollars a year.

"One officer charged with the disbursements of the Senate, at a salary of five hundred and seventy-six dollars a year.

"One *financial clerk*, in the office of the Secretary of the Senate, at a salary of three thousand dollars a year * * *."

By these provisions there is an absolute right to the payment of the salary due to each Senator "at the end of each month." The proper appropriation has been made for the payment of the salaries of Senators and of the officers, clerks, and employes of the Senate. (21 Stats., 385.)

The right to a monthly payment being established, the question now to be considered is: What provision has been made by law for the fulfillment of this public engagement? The following sections of the Revised Statutes contain the provisions applicable thereto as a general rule:

"SEC. 46. The compensation of members [of the Senate and House] and delegates shall be passed as public accounts, and paid out of the public Treasury.

"SEC. 56. The moneys which may be appropriated for the compensation of members and officers, and for the contingent expenses of the Senate, shall be paid at the Treasury, on requisitions drawn by the Secretary of the Senate, and shall be kept, disbursed, and accounted for by him according to law, and the Secretary shall be deemed a disbursing officer.

"SEC. 62. The Secretary of the Senate and the Clerk of the House of Representatives shall each require of the disbursing officers *acting under their direction or authority*, the return of precise and analytical statements and receipts for all the moneys which may have been from time to time, during the next preceding year, expended by them; and the results of such returns and the sums total shall be communicated annually to Congress, by the Secretary and Clerk, respectively."

It is obvious that, as respects the Senate, this mode of payment can be observed only when the office of Secretary is filled by a duly qualified incumbent.

There are two modes of discharging the financial liabilities of the United States when appropriations are made therefor:

I.—BY THE SETTLEMENT AND ADJUSTMENT OF AN ACCOUNT PURSUANT TO SECTION 236 OF THE REVISED STATUTES.

This section provides that "all claims and demands whatever by the United States or against them, and all accounts whatever in which the

United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

Where there is no disbursing officer charged (1) by statute, or (2) by authorized regulations, or (3) by appointment under incidental authority, with the duty of making payment of public moneys to a creditor of the United States, or claimant of moneys in the Treasury, such creditor or claimant has a right to present his claim or demand to the proper accounting officers of the Treasury for adjudication and payment. (Rev. Stats., 236, 269, 277.) In such case, unless otherwise provided, the First Auditor states and settles an account, and the balance found due to the creditor or claimant is, when certified by the First Comptroller, paid by the Treasurer of the United States, either in money or by draft, upon a warrant drawn by the Secretary of the Treasury and countersigned by the Comptroller. (Rev. Stats., 236, 248, 269, 277, 305, 306, 307, 308.) This is the general mode of paying the public liabilities. It applies as well to the compensation of Senators, Representatives, and Delegates in Congress (Rev. Stats., 46) as to other claims and demands against the United States.

II.—WITHOUT THE SETTLEMENT AND ADJUSTMENT OF AN ACCOUNT BETWEEN THE UNITED STATES AND THE CLAIMANT OR CREDITOR.

This mode is authorized by law, and is or may be adopted in all cases in which money may be advanced to properly qualified disbursing officers or agents of the Government for the fulfilment of the public engagements. Section 3648 of the Revised Statutes provides that "it shall be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be *necessary* to the faithful and prompt discharge of their respective duties, and to the *fulfillment of the public engagements*." The President may also direct such advances as he may deem necessary and proper to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected."

From the moneys so advanced to such disbursing officers they pay such liabilities of the United States as they may be authorized to discharge, *e. g.*, salaries of public officers and employes, pensions, and other liabilities of which the amount to be paid to each creditor is fixed by law or regulations or may be ascertained by application to the proper accounting officers. When the disbursing officers make such payments they are required to take proper receipts therefor, and to render accounts to the Treasury Department monthly, with such receipts as vouchers. (Rev. Stats., 3622, 3623.) These accounts are examined and certified

by the proper auditors and by them referred for revision and certification to the First or Second Comptroller, or the Commissioner of Customs, as the law may require. This mode of payment enables the Treasury Department to discharge promptly the public engagements and liabilities in vast a multitude of cases; and for this purpose, as well as for that of saving the accounting officers the labor of stating and certifying a large number of accounts when one account would answer, this mode is authorized by law. If the disbursing officer is in doubt as to the amount due, or as to the form of voucher to be taken, or as to any other question in relation to his account, he submits the matter to the proper accounting officer before making payment; and the latter instructs him, and thus gives a *decision in advance* of the settlement of the account. This practice is necessary to the maintenance of the disbursing system, and is therefore proper. (Senate-Clerks' case, *ante*, 66.)

Although section 46 of the Revised Statutes says that the compensation of members and delegates shall be passed as public accounts, and paid out of the public Treasury, this does not mean that it shall be paid only in the first mode stated above. The second mode is, as will be seen by the statutory provisions already cited and referred to, fully authorized, unless there is some strong reason or express provision of law against it. Section 46 would seem to be mere legislative surplusage; it can only imply that the First Auditor and First Comptroller of the Treasury Department are to examine the accounts and certify the balances in the cases to which it refers; but this is a duty incumbent on them by the organic laws of the public accounting system. (Rev. Stats., 236, 269, 277.) If there were no statutory provision for a special disbursing officer of the Senate, an account for the compensation of each of the members, officers, clerks, and employés of that body could be stated monthly under the general provisions of law; and warrants and drafts for the amounts found due would issue as in the case of other accounts. Or, instead of a separate account for each person, a general account, upon which one warrant for the total amount due each month would issue, accompanied with directions to the Treasurer to make payment, by draft or otherwise, to each individual of the amount found to be due him, might be stated. Or, again, the Secretary of the Treasury might, by virtue of the provisions of sections 3614 and 3648 of the Revised Statutes, appoint a special agent to disburse the public money due each month to the members, officers, &c., of the Senate. It might become necessary for the Secretary to make such appointment, as the most expeditious and convenient method of performing the duty incumbent on the Treasury Department to fulfil the financial engagements of the Government towards these persons.

In the case now under consideration, however, the law has provided for a special disbursing officer, namely, the Secretary of the Senate. During the first sixty-five years of its existence the Senate was without the convenience secured by making its own Secretary its disbursing officer for all purposes. In the act of September 22, 1789, (1 Stats., 70.) first allowing compensation to the members and officers of the Senate and House of Representatives, there was no provision for a disbursing officer of either body. The compensation, under that act, was to be certified by the President of the Senate and the Speaker of the House of Representatives for their respective Houses; and the accounts therefor were to be "passed as public accounts, and paid out of the public Treasury," substantially as provided in section 46 of the Revised Statutes. This method was continued by the acts of March 10, 1796, (1 Stats., 449, sec. 5;) March 19, 1816, (3 Stats., 257;) January 22, 1818, (3 Stats., 409, sec. 3;) and September 30, 1850, (9 Stats., 523, carried into section 48 of the Revised Statutes.) Though the Secretary of the Senate and the Clerk of the House of Representatives were, by the act of February 23, 1815, (3 Stats., 412, ch. 51,) made disbursing officers of the *contingent* fund of their respective Houses, it was not until the passage of the act of February 10, 1854, (10 Stats., 267, carried into sections 56 and 57 of the Revised Statutes,) that the Secretary of the Senate was made the disbursing officer of the *compensation* of the members and officers of that body, as well as of its contingent fund; and the penal sum of his bond to the United States, in his new character as the sole disbursing officer of the Senate, was, by section 2 of the same act, raised to twenty thousand dollars.

A special disbursing officer of the Senate being thus provided by law, the question arises whether in the event of his death or disability, or of a vacancy from any cause in the office, the Treasury Department may adopt either of the methods above mentioned for the fulfilment, each month, of the public engagements towards the members, officers, &c. of the Senate.

If the Treasury Department is without this power, there is a *casus omissus* in the law; there is a statutory right without a remedy. This is a conclusion which should not be reached if by a fair and reasonable construction of the existing provisions it can be avoided. These provisions are *remedial*, and, being so, they are to be construed liberally; for in the case of a remedial statute "everything is to be done in advancement of the remedy that can be given consistently with any construction that can be put upon it." (Potter's Dwarrris on Statutes, 261.) In taking remedial statutes by equity, the enacting words may be ex-

tended "beyond their natural import and effect, in order to include other cases * * * within the apparent intention of the legislature." (*Id.*) The true and ancient rule is, to give "such construction as shall * * * add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*." (Heydon's case, 3 Rep., fol. 7 b; Magdalen College case, 11 Rep., fol. 73 b; Bac. Abr., tit. "Statutes;" Att.-Gen. *vs.* Walker, 3 Exch., 258; Miller *vs.* Salomons, 7 Exch., 522; Jackson *vs.* Burnham, 8 Exch., 180; Warburton *vs.* Loveland d. Ivie, 1 Hudson & B., 647; Becke *vs.* Smith, 2 Mees. & W., 198.) The reason of the law is the life of the law. Every reason applicable to the construction of remedial statutes conferring jurisdiction on courts will apply with equal force to similar statutes giving executive jurisdiction; and the maxim *Est boni judicis ampliare jurisdictionem* has equal application to the case of executive or quasi-judicial officers exercising authority remedial in its nature.

Even if a *casus omissus* were revealed in the present case by the failure of Congress to provide for the devolution of the duties of the Secretary of the Senate as a disbursing officer in the case of his death or disability, or a vacancy from any cause in the office, it would furnish an appropriate instance—if any case since the compilation of the Revised Statutes could—of the applicability of the rule, that the particular case left unprovided for should be disposed of according to the law as it existed prior to the enactment of the special provision which had become inoperative. (*Bole vs. Horton*, Vaugh. R., 373; *Beaumont vs. Barrett*, 1 Moo. P. C. C., 77; *Kielley vs. Carson*, 4 Moo. P. C. C., 88; *Doyle vs. Falconer*, 4 Moo. P. C., N. S., 219; s. c. L. R., 1 P. C. App., 328; *Burdett vs. Abbott*, 14 East, 138.) The omission of the legislature to make special provision for the contingency which has just happened may be accounted for either by the maxim *Quod semel aut bis existit prætereunt legislatores*, or by presuming, as may reasonably be done, that Congress considered the provisions of sections 236, 3614, and 3648 of the Revised Statutes sufficiently broad to cover the present contingency and any other of similar character.

In strict fact, however, this case does not disclose a *casus omissus*. The provisions of law for the appointment of disbursing officers were designed to furnish aids to the Treasury Department in the performance of its duty of fulfilling the public engagements, and not to interpose obstacles to such performance. Section 161 of the Revised Statutes authorizes the head of each Executive Department to "prescribe regulations, not inconsistent with law, for the government of his Department, * * * the distribution and performance of its business

* * *;" and section 248 provides that the Secretary of the Treasury shall, from time to time, "grant * * * all warrants for moneys to be issued from the Treasury in pursuance of appropriations by law;" and "generally perform all such services relative to the finances as he shall be directed to perform." In the performance of such services he may adopt all proper and necessary forms and modes of giving effect to the law. (*United States vs. Macdaniel*, 7 Pet., 2; *Tracy vs. Swartwout*, 10 Pet., 95; *United States vs. Barrows*, 1 Abb. C. C., 351.) The provision in section 3648 authorizing the President "to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements," contemplates the disbursement of the public money under the second mode of discharging the public obligations or engagements which has been adverted to above; but it does not necessarily exclude the first mode, nor preclude the Treasury Department from pursuing it where it shall be found most convenient or shall have become necessary to the faithful and prompt discharge of such obligations.

There is a maxim particularly applicable to this case, *Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest*:—"Whenever anything is authorized, and especially if, as a matter of duty, required by law to be done, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intentment." (*Fenton vs. Hampton*, 11 Moo. P. C. C., 360.) The Secretary of the Treasury is authorized to advance moneys monthly for the payment of the salaries in question; it is a matter of duty required by the law to be done. It is impossible to advance to the disbursing officer of the Senate, for there is no such officer at present. If the law does not in express terms authorize an advance to any other officer for the purpose of paying the salaries due, this authority will be implied as having been necessarily intended by Congress in such a case.

The Treasurer of the United States is the chief disbursing officer of the Government. He is required by section 3639 of the Revised Statutes, when ordered by the proper Department or officer of the Government, to make such payments and perform such other duties as fiscal agent of the Government as may be imposed upon him by law, or by regulations of the Treasury Department made in conformity to law. In the discharge of these duties, section 3644 provides that all moneys paid into the Treasury of the United States shall be subject to his draft, and section 3593 includes within this jurisdiction all public moneys paid into any depository.

These extensive powers of the Secretary and Treasurer are amply sufficient to meet the necessities of the present case.

The construction given to section 3648, as settled by long usage, is that no special direction of the President as to each advance is required, but that a special order from him applicable to a class of, or to all, cases is a sufficient compliance with the statute. (Inspectors' case, 1 Lawrence, Compt. Dec., 201; Williams *vs.* United States, 1 How., 290; United States *vs.* Eliason, 16 Pet., 302; Wilcox *vs.* Jackson, 13 Pet., 513.) This construction is recommended by various considerations of convenience and justice. In conjunction with the statutory provisions already adverted to, it obviates the necessity of having recourse in such a case as the present to the method of paying through the medium of a stated account. As instances of this construction, may be mentioned the Executive orders severally of President Pierce, under date March 22, 1853; of President Grant, under date September 10, 1873; and of President Hayes, under date June 15, 1877. (Quoted in Inspectors' case, *supra*.)

As an instance of the method pursued in giving effect to this construction, the letter of the late R. W. Tayler, First Comptroller, under date March 11, 1869, to President Grant, and the President's order of the same date relative thereto, are in point. The Comptroller's letter runs:

"I have the honor to request that, in accordance with former practice, and under authority of the act of January 31, 1823 [Rev. Stats., sec. 3648] 'concerning the disbursement of public money,' the President will direct that needful advances of money be paid to disbursing officers in the civil service of the Government, who may have given bonds as required by law; to such military and naval officers as may by law be authorized to disburse the same; and to the bankers of the United States in London."

The President's order reads as follows:

"Under authority of the act of January 31, 1823, 'concerning the disbursement of public money,' permission is hereby given that needful advances of money be made to disbursing officers in the civil service of the Government, who may have given bonds as required by law; to such military and naval officers as may by law be authorized to disburse the same; and to the bankers of the United States in London; as requested in your letter * * *."

Under the authority of the comprehensive terms of this order, and of the general provisions of law already referred to, the Secretary of the Treasury on the 1st instant, pursuant to the advice of the First Comptroller, directed that advances be made to the Treasurer for the payment each month of the compensation of the members, officers, &c., of the

Senate. The direction was appended to a copy of the above-cited Executive order of President Grant, and it reads as follows:

“TREASURY DEPARTMENT,

“August 1, 1881.

“The death of the Hon. John C. Burch, Secretary of the Senate of the United States, having left that office without a disbursing officer, there will be advanced from time to time to the Treasurer of the United States, from the proper appropriations, in accordance with the foregoing order, such amounts as may be necessary to the fulfilment of the public engagements, with reference to salaries of Senators of the United States, and officers, clerks, and employés of the Senate and its committees.

“WILLIAM WINDOM,

“Secretary.

“Countersigned:

“WILLIAM LAWRENCE,

“First Comptroller.”

This mode of payment will be continued until the election; and qualification as disbursing officer, of a Secretary of the Senate.

A question has been made whether the financial clerk of the Senate may not, during the vacancy in the Secretaryship, act as disbursing officer of that body. The financial clerk acts under the “direction or authority” of the Secretary of the Senate. (Rev. Stats., 62.) He is not its disbursing officer. The Secretary of the Senate is responsible to the United States for all public moneys coming into his hands, which he intrusts to the financial clerk. It is clear that in disbursing such moneys the financial clerk can only act under the direction or authority of the Secretary. The duties of the clerk with respect to public moneys are limited by law to such disposition of them, by him, as may be directed or authorized by the Secretary of the Senate. These duties cannot be extended beyond the statutory limits. The financial clerk is not, by virtue of his office, a disbursing officer within the meaning of section 3648 of the Revised Statutes, although in section 62 he is impliedly referred to as a disbursing officer under the Secretary of the Senate; but this reference is to be taken in connection with the specific provisions of other sections relative to the disbursement of the public moneys. Section 56 distinctly provides that the moneys appropriated for the Senate shall be drawn from the Treasury by the Secretary of the Senate, and be disbursed and accounted for by that officer according to law.

The accounting officers of the Treasury are by this section and by sections 236, 269, and 277, authorized to state and certify accounts for such moneys with the Secretary of the Senate. There is no authority for stating such accounts with the financial clerk, and section 62 is itself conclusive against the existence of such authority. The Senate cannot

by resolution confer on any of its officers, other than a duly elected and qualified Secretary of that body, authority to disburse the moneys appropriated for the compensation of its members, officers, clerks, and employés. (6 Op. Att.-Gen., 680.)

The power conferred on heads of Departments by section 3614 might possibly be held to warrant the *employment* by the Secretary of the Treasury of the financial clerk as a special agent for the disbursement of the monthly compensation of the members, officers, &c., of the Senate; but in this capacity he would be an employé of the Treasury Department, having no relation to his official character as the financial clerk of the Senate. The adoption, however, of a different mode of meeting the emergency occasioned by the death of Mr. Burch has rendered it unnecessary to decide this point.

The Treasurer of the United States has been instructed to make monthly payments of the compensation of the members, officers, clerks, and employés of the Senate, in the mode directed by the Secretary of the Treasury, and to render his accounts for such disbursements in the usual form. Should it become necessary, he will be authorized to disburse also the contingent fund of the Senate, under the limitation imposed by section 76 of the Revised Statutes, and conformably to the construction regarding the disposition of that fund which has been given in the "Special-Session case," *ante*, 78, 83.

TREASURY DEPARTMENT,

First Comptroller's Office, August 2, 1881.

IN THE MATTER OF THE AVAILABILITY OF FEES, OR OF
INCIDENTAL-EXPENSES APPROPRIATION, FOR PAYMENT
OF CLERICAL COMPENSATION.—DISTRICT LAND-OFFICE
CASE.

1. Construction given to sections 2239, 2240, 2241, 2255, 3617, 3660, 3678, 3679, and 3682 of the Revised Statutes.
2. The general words of prohibition in one section of the Revised Statutes may be qualified and restrained in their application to a particular case by another section of the revision, or by a subsequent statute, when such intention on the part of Congress is sufficiently apparent.
3. Section 3682, declaring that "no moneys appropriated for * * * incidental * * * purposes shall be expended or paid for * * * clerical compensation," is, as to clerks in district land-offices, qualified by section 2255, which declares that, in a certain event, those clerks employed by the register, with the approval of the Secretary of the Interior, shall be paid "out of the appropriation for incidental expenses of district land-offices."

The clear intention of Congress should prevail, even as against the mere letter of a statute. Hence, as section 2255 of the Revised Statutes declares that when no surplus exists of the fees authorized to be charged by section 2239, the compensation of clerks in district land-offices shall be paid out of the appropriation for incidental expenses of such offices, the compensation may, when the fees thus charged cannot be lawfully applied to that purpose, be paid out of such appropriation.

5. The "surplus fees" mentioned in sections 2239 and 2255 of the Revised Statutes cannot, in the absence of an appropriation act, be used, either before or after being covered into the Treasury, in paying for the compensation of clerks in district land-offices.
6. The question considered: Whether it is competent for Congress to give authority, without a specific appropriation act, to use public money for a public purpose before it is covered into the Treasury.
7. The general provisions of one section of the Revised Statutes in relation to a particular subject cannot be restrained by a special provision of another section relating to the same subject, unless there be a reasonably clear purpose to make an exception to the general provisions. Hence, if there can, by fair construction, be a purpose for the special provision, without construing it as an exception to the general one, it should be so construed as to subserve that purpose only. An apparent inference, or implication, resulting from the provisions of one section, cannot restrain or limit the clear, general words of another section.
8. When the sections of the Revised Statutes are clear, resort cannot be had, in order to give them construction, to the statutes from which they were taken.
9. Registers and receivers of district land-offices cannot retain, in payment of compensation due them from the United States, the fees they receive under section 2239. These fees must be covered into the Treasury.
10. Section 2255 of the Revised Statutes does not make an appropriation, nor, in view of other sections, does it authorize the application of fees received under section 2239 to the payment of compensation due registers or receivers.
11. The annual appropriation for "incidental expenses of district land-offices" is the only source whence the compensation of clerks temporarily employed, pursuant to section 2255 of the Revised Statutes, can lawfully be paid.

The Commissioner of the General Land Office, by letter of July 27, 1881, to the First Comptroller, says:

"There is annually appropriated for 'Contingent expenses, land offices,' the sum of \$100,000, to pay the salaries of clerks, rent of offices, stationery, and other necessary bills for furniture, plat books, repairs, &c. The number of land offices now in operation aggregate ninety-seven, with a continual increase in the area of lands yearly disposed of under the several methods of obtaining title to the public lands. * * * The amount appropriated to meet these expenses has become inadequate. * * *

"By reference to section 2239 of the Revised Statutes, it will be seen that the register of a consolidated local office is authorized to charge the same fees as are charged in the local courts of his district for making transcripts for individuals, and furnishing any other record information respecting public lands or land titles; such fees to be shared with the receiver.

"Section 2255 authorizes the employment by registers of consolidated land districts, with the approval of the Secretary of the Interior, of a sufficient clerical force, at a reasonable per-diem compensation, for such time as such force is absolutely required to keep up the current business, the expense thereof to be paid from the surplus fees, if any exist, authorized to be charged by section 2239; if not, then to be paid from the appropriation for 'Contingent expenses, land offices.'

"While section 2255 authorizes the payment of such clerical force from said surplus fees, section 3617 directs that the gross amount of all moneys received from whatever source for the use of the United States, except as provided in section 3618, which has no reference to the matter in question, shall be paid by the officer or agent receiving the same into the Treasury without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever.

"If by section 3617 receivers of public moneys in consolidated offices are precluded from paying the salaries of clerks employed therein from surplus fees earned under section 2239, and are required to pay into the Treasury the gross receipts of their offices, *could not a portion of such surplus fees, sufficient to pay the salaries of clerks in said offices, after they have been paid into the Treasury, be placed to the credit of the current appropriation for 'Contingent expenses, land offices,' as authorized by section 2255?* * * *

"An early decision is respectfully requested."

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

The sundry-civil appropriation act of March 3, 1881, appropriates for the service of the fiscal year ending June 30, 1882, "for incidental expenses of the several [district] land-offices," \$100,000. (21 Stats., 435, 450.) Section 3682 of the Revised Statutes declares that "no moneys appropriated for contingent, incidental, or miscellaneous purposes shall be expended or paid for official or clerical compensation." Section 2255 provides that "the Secretary of the Interior is authorized to make a reasonable allowance for office-rent for each consolidated land-office, and, when satisfied of the necessity therefor, to approve of the employment by the register of one or more clerks, at a reasonable per-diem compensation, for such time as such clerical force is absolutely required to keep up the current public business, *which clerical force shall be paid out of the surplus fees* authorized to be charged by section twenty-two hundred and thirty-nine, if any; and if no surplus exists, then out of the *appropriation for incidental expenses* of district land-offices; but no clerk shall be so paid unless his employment has been first sanctioned by the Secretary of the Interior."

Here are two sections in apparent conflict—a circumstance not unusual in the Revised Statutes. (Huidekoper's case, *ante*, 354.)

The provision of section 2255, authorizing payment of clerical compensation. H. Ex. Doc. 219—27

pensation out of the fees collected under section 2239, is in apparent conflict also with section 3617, which provides that "the gross amount of all moneys received from whatever source for the use of the United States * * * shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post-Office Department."

Literally, if such surplus should exist and yet could not for any cause be used, clerks could not be paid from the appropriation for incidental expenses. But such construction would give effect to the mere letter of the statute, and not its purpose. The maxim applies: *Qui hæret in literâ, hæret in cortice*. All construction should be reasonable, and such as to carry out the intention of the law-making power. Section 2255 authorizes registers to appoint clerks with the approval of the Secretary of the Interior; and Congress evidently intended that the compensation of such clerks should be paid from the fund which the law had appropriated for the purpose. If one fund which might have been made available by Congress for paying such compensation, even under a pledge that it should be, has not, in fact, been so made, then, any other fund which is made available by appropriation may be used.

The "surplus fees" referred to in sections 2239 and 2255 of the Revised Statutes, cannot, in the absence of an appropriation by Congress, be used in making payment for clerical compensation, but must be covered into the Treasury; and, being so covered in, no part thereof can be "placed to the credit of the current appropriation for contingent [incidental] expenses of land offices," as suggested by the Commissioner.

Section 2239 provides that—

"The register for any consolidated land-district, in addition to the fees now allowed by law, shall be entitled to charge and receive for making transcripts for individuals, or furnishing any other record information respecting public lands or land-titles in his consolidated land-district, such fees as are properly authorized by the tariff existing in the local courts of his district; and the receiver shall receive his equal share of such fees * * *."

Section 2240 provides that—

"The compensation of registers and receivers, including salary, fees, and commissions, shall in no case exceed in the aggregate three thousand dollars a year, each * * *."

Section 2241 provides that—

"Whenever the amount of compensation received at any land-office exceeds the maximum allowed by law to any register or receiver, the excess shall be paid into the Treasury, as other public moneys."

The following sections contain provisions which are of general application in the expenditure to the appropriations made by Congress:

"SEC. 3660. The heads of Departments, in communicating estimates of expenditures and appropriations to Congress, or to any of the committees thereof, shall specify, as nearly as may be convenient, the sources from which such estimates are derived, and the calculations upon which they are founded, and shall discriminate between such estimates as are conjectural in their character and such as are framed upon actual information and applications from disbursing officers. They shall also give references to any law or treaty by which the proposed expenditures are, respectively, authorized, specifying the date of each, and the volume and page of the Statutes at Large, or of the Revised Statutes, as the case may be, and the section of the act in which the authority is to be found."

"SEC. 3678. All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

"SEC. 3679. No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations."

With these provisions in view, it is clear that the "surplus fees" cannot, before being covered into the Treasury, and in the absence of a regular appropriation act, be applied in paying clerical compensation.

1. Section 2241 of the Revised Statutes expressly requires that "the excess [that is, the surplus fees] shall be paid into the Treasury, as other public moneys."

2. Section 3617 requires this money to be paid into the Treasury, because the surplus fees are received "for the use of the United States."

3. Section 3679 prohibits any expenditure in excess of appropriations, and there has been no appropriation of these "surplus fees." All fees collected constitute a fund which is to be appropriated by specific act before it can be used.

4. The purpose of Congress not to permit the use of any money without an appropriation is shown in the provisions (Rev. Stats., 3660, &c.) requiring estimates to be submitted to Congress in all cases where money is to be paid out in pursuance of treaty or statute, so as to keep all public moneys within the control of Congress. In section 3687, making a permanent annual appropriation for collecting customs revenues, an appropriation is expressly made of all sums received "from fees paid into the Treasury by customs officers," which shows the same purpose.

5. There is one view which might seem to authorize the use of "surplus fees" without a specific appropriation of them. Section 2255 declares that the "clerical force shall be paid out of the surplus fees."

It may be assumed that it is competent by statute to authorize the use of money, or apply it to a specific purpose, before it comes actually into the Treasury. The Constitution declares that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law." (Art. I, sec. 9, cl. 7.) The purpose of this was to reserve to Congress the right to control the public money, and to declare in effect that no judgment of a court, or official discretion, could, even under a statute, dispose of or use the public money without (1) a law to authorize such disposition or use, and (2) a formal appropriation act. (Story, Const., secs. 1346-'49; see *United States vs. Nicoll et al.*, 1 Paine, C. C., 651; *United States vs. Hare*, 4 Saw. C. C., 670; *Seabury vs. Field and others*, 1 McAll. C. C., 1; *Friedman vs. Goodwin*, *Id.*, 148; 4 Op. Att.-Gen., 480; 9 Op., 476; 13 Op., 46; 16 Op., 477.) The Government is often the owner of money collected by its agents and not yet actually in the Treasury. It might be urged with much force that that clause of the Constitution which declares that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law," applies to all public money, and prohibits its use except under the authority of an appropriation; that the spirit and purpose of the provision was to subject all public money not merely to (1) the control of law, but to (2) the limitations of an appropriation; that to limit the necessity for an appropriation to money in the Treasury is to adhere to the mere letter—to "stick in the bark."

There have been instances in which Congress has authorized the use of public money before it reached the Treasury and without a formal appropriation. The act of June 30, 1864, (13 Stats., 240, sec. 44,) repealed the act of March 3, 1865 (13 Stats., 483, sec. 3). (See the act of March 3, 1855; 10 Stats., 649; Excess-Refund case, *ante*, 344; Indian Land case, *ante*, 369.) The postal revenues do not come into the Treasury; they are disbursed by the collecting or other specially authorized postmasters; but this practice has the sanction of appropriation acts. (1 Lawrence, Compt. Dec., Introd., and also Appx., page 499.)

But assuming that Congress may, without formal appropriation, authorize the use of money *not yet covered into the Treasury*, the question recurs, Has this been done as to the "surplus fees" in question? In other words, when section 2255 declares that the "clerical force shall be paid out of the surplus fees," is this authority for such use? If these words stood alone, and assuming that Congress can, in this mode, authorize such use of the "surplus fees," such use would seem to be authorized. It has been shown, however, that sections 2241, 3617, 3660, and 3679, with equal distinctness, prohibit such use of the

“surplus fees.” Here is another apparent contradiction in different provisions of the statute. It will frequently happen in analogous cases that a special authority for a particular purpose, authorized in one section of a statute, which would seem to be prohibited by the general provisions of other statutes, will nevertheless be available. The general provisions are to be so far restrained by construction as to permit the special authority to be operative. (Subpœna case, *ante*, 286; Huidekoper’s case, *ante*, 364; s. c., 3 Lawrence, Compt. Dec.; Doe *vs.* Galloway, 5 B. & Ad., 43, 51; Sedgwick, Stat. and Const. L., 211; N. L. & B. Inst. *vs.* Com., 14 B. Monroe, 266; Dodge *vs.* Gridley, 10 Ohio, 178; McCartee *vs.* Orphan Asylum Society, 9 Cowen, 437, 506; 14 Op. Att.-Gen., 577; Bishop, Stat. Crimes, sec. 126; Broom, Leg. Max., 646.) But general provisions cannot be so restrained, unless there be a reasonably *clear* intention to do so. (Sedgwick, Stat. and Const. L., 47, 50, 360; Broom, Leg. Max., 677; Minis *vs.* United States., 15 Pet., 445; 2 Pars. Cont., 507, *n.* (*h.*); Claims-Assignment case, 3 Lawrence, Compt. Dec.)

This principle of construction cannot, however, be adopted as applicable to the case presented by the Commissioner; because the fees, having been covered into the Treasury, cannot, in view of the prohibition of the Constitution, (Art. I, sec. 9, cl. 7,) “be drawn from the Treasury” unless there be authority therefor by an appropriation made by law; and no such appropriation has been made. Neither can the principle be adopted in cases in which the surplus fees have not been covered into the Treasury; for, as already shown, section 2255 does not make an appropriation, and the purpose of all the legislation cited is to prohibit the paying out of public money without an appropriation authorizing such payment.

The words in section 2255, “to be paid from the surplus fees,” should not, if it be possible to avoid it, be construed as having no force or meaning. In order, therefore, to render them operative, they must be construed as constituting such fees a fund, from which, when so authorized by an appropriation act, the clerks may be paid (1) by the receiver before covering the fees into the Treasury, or (2) after the fees are covered into the Treasury, by making, for the purpose of such payment, an advance therefrom to the receiver. The like construction has been given to other sections of the Revised Statutes in analogous cases. (Excess-Refund case, *ante*, 344; Indian-Land case, *ante*, 369, 373.)

Section 4803 of the Revised Statutes creates a *fund* from the “tax upon seamen for hospital purposes,” but it was deemed necessary to incorporate therein a provision by which it “is appropriated” for its purposes.

Section 4584 creates a fund, but specifically disposes of it *before it comes into the Treasury*, and requires it to "be accounted for with the Treasury every six months." (3 Op. Att.-Gen., 13.)

An appropriation "for incidental expenses of the several land-offices" having been made, a portion of which was intended for the payment of clerks, (act March 3, 1881; 21 Stats., 435, 450,) it might well be supposed that this was all the provision which Congress intended should be made for the payment of clerks in the several land-offices during the fiscal year 1882. (Clerk's case, 1 Lawrence, Compt. Dec., 305.)

When the proper facts exist to justify it, the clerical compensation mentioned in section 2255 of the Revised Statutes may be paid from the appropriation "for incidental expenses" (act March 3, 1881; 21 Stats., 435, 450) of the several [district] land-offices.

The only doubt which can arise as to this conclusion, grows out of the apparent conflict of sections 3682 and 2255 of the Revised Statutes, the former of which declares that "no moneys *appropriated* for contingent, *incidental*, or miscellaneous purposes *shall be expended or paid* for official or clerical compensation;" while the latter section, on the contrary, provides that certain clerks employed by the registers, respectively, of consolidated land-offices, "shall be paid out of" certain fees, or, if no surplus thereof exists, "then out of the *appropriation for incidental expenses* of district land-offices." But, upon well-settled principles, already stated and supported by authorities, the general words and broad prohibitions contained in section 3682 are to be restrained by that portion of section 2255 which declares that payment may be made "out of the appropriation for incidental expenses of district land-offices." This leaves section 3682 to apply to all cases except those named in section 2255.

These two sections are *in pari materia*; they are to be read and construed together, and, when so read, they have precisely this effect:

No moneys appropriated for incidental purposes shall be paid for clerical compensation; but clerks employed, with the approval of the Secretary of the Interior, by registers, respectively, in the consolidated district land-offices, when not paid from an appropriation of surplus fees, shall be paid out of the appropriation for incidental expenses of district land-offices.

Any other view would leave the compensation of clerks unprovided for, and attribute to Congress an omission of duty; and such a view is not to be taken if the statutes reasonably admit of a different construction.

It may be proper in this connection, also, to state that registers and receivers are not authorized to retain from fees any portion of the

maximum compensation to which they are respectively entitled. Section 2241 seems to give some apparent sanction to the right so to retain fees. In fact, it declares what shall be done with the excess; but any mere inference which might arise as to that portion of the fees which is not excess or surplus is rebutted by section 3617, which requires all fees to be paid into the Treasury. This result follows from principles already stated. A mere inference or implication resulting from the language of one section cannot restrain the express general words of another section.

The construction now given to the statutes, on all the questions, is in accordance with usage and the general understanding. In the estimates of appropriations for the fiscal year ending June 30, 1882, made by heads of Departments, and submitted to Congress in December, 1880, page 174, will be found the following from the Interior Department:

“Contingent expenses of land offices.

“Incidental expenses of the several land offices (date of act providing for expenditure, June 16, 1880, 21 Stats., 273, sec. 1), \$100,000.

“NOTE.—The amount asked for under this head is intended to cover allowances for office-rent, clerk-hire, &c., as well as for fees heretofore retained by the district officers, collected under sections 2238 and 2239, Revised Statutes, and not properly accounted for. Under the corrected practice, all such fees must be covered into the Treasury, and will stand as an offset to this appropriation, which will be disbursed by proper account and requisition according to law, upon allowances for clerk-hire, rent, &c., under the express authority of the Secretary of the Interior, previously obtained. There are nearly one hundred district offices already established by law, and others are liable to be created from time to time. The amount submitted will barely suffice to cover the proper and necessary allowances.”

Estimates cannot be looked to for the purpose of construing the statute, but may be consulted as evidence of the prevailing construction. (Sedgwick, Stat. and Const. L., 203; 4 Op. Att.-Gen., 534; Bank of Pennsylvania *vs.* The Commonwealth, 7 Pa. St., 144; Southwark Bank *vs.* The Commonwealth, 26 *Id.*, 466; Leese *vs.* Clark, 12 Cal., 387, 425; Taylor *vs.* Taylor, 10 Minn., 107.)

The provision in section 2255, indicating the sources whence compensation for the necessary clerical services therein authorized may be alternatively paid, is on its face antagonized both by sections 3617 and 3682; and as the provisions of both these sections, which are in contravention of the modes of payment authorized in section 2255, are clear and unambiguous, it may well seem difficult to decide which of them must give way, if either must, to the provision in section 2255—in other words, upon what principles the last-named provision can be

construed as constituting an exception to one and not to the other of the apparently conflicting sections. If it cannot be construed as forming an exception to either or to both of those sections, it is inoperative. The main object of section 2255 is to authorize the employment, temporarily, of the clerical force necessary "to keep up the current public business" in the consolidated land-offices; and when, for this purpose, clerks are employed by the Register in conformity with the section, the *right* to "a reasonable per-diem compensation" for such time as they are so employed becomes vested in them, without regard to the mode or source of payment indicated in that or any other section, or to the absence of any provision whatever for making the payment.

Two funds are, however, pointed out as the sources whence such payment shall be made, namely: (1) from the fees authorized to be charged by section 2239 of the Revised Statutes; or (2) "out of the appropriation for incidental expenses of district land-offices."

Are both of these funds available? If not, is either of them available? and, if so, which one?

Before the passage of the act of Congress of February 18, 1861, (12 Stats., 131,) making further provision in relation to consolidated land-offices (from which sections 2239 and 2255 of the Revised Statutes have been compiled), all fees, without exception, which were earned and collected in any land district, were, pursuant to the section 1 of the act of March 3, 1849, (9 Stats., 398,) "requiring all moneys receivable from customs and from all other sources to be paid immediately into the Treasury, without abatement or reduction," (from which section 3617 of the Revised Statutes has been compiled,) required to be "paid into the Treasury of the United States at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever."

The intention of Congress to give this requirement the most sweeping character and comprehensive application is shown by the *proviso* in section 1, excepting from its operation one class—and one only—of moneys received for the use of the United States, namely, "the revenues of the Post-Office Department." This intention was virtually reaffirmed by Congress in the following year, when, by section 3 of the act of September 28, 1850, (9 Stats., 507,) it enacted "that the moneys which may be received by the proper officers of the Army for the sales of subsistence, military stores, and other supplies, be, and they are hereby, *exempted from the operation* of the act of the third of March, eighteen hundred and forty-nine."

In order to give effect to section 2 of the act of February 18, 1861.

authorizing the payment of clerical compensation "out of the surplus fees" provided for in section 1 of that act, section 2 must be construed as forming a third legislative exception to the sweeping requirement of the act of 1849. If the language of sections 2255, 3617, and 3682 of the Revised Statutes were not so plain and unambiguous, it would be proper to resort to those original enactments for the purpose of ascertaining the true intent and meaning of these sections; but, as the conflict between their provisions is equally plain, and as, unaided by the light cast upon them by a reference to the history of the original acts, one or the other must, as to the question under present consideration, be inoperative, such a resort would seem to be as reasonable and necessary as in the case of ambiguity in the language of the statute.

The clear intention of Congress, as manifested in the acts whose history has been sketched, was to make the fees in question primarily available for the payment of compensation to clerks in the district land offices; and, on failure of such fees, or the insufficiency of their amount, or upon their being paid into the Treasury, to make the appropriation for incidental expenses of district land-offices secondarily available for that purpose. Such was the evident meaning of the law until the passage of the act of July 12, 1870, (16 Stats., 230, 250,) which enacted, in section 3, that "after the passage of this act no moneys herein or otherwise appropriated, or that may be hereafter appropriated, for contingent, incidental, or miscellaneous purposes, shall be expended or paid for official or clerical compensation; and it shall be the duty of the accounting officers to reject and disallow all such payments as illegal." Section 3682 of the Revised Statutes was taken from this enactment. So stood the law when the Statutes at Large were revised and consolidated. (*Ante*, 344-7.) There had been no exception in the legislation between July 12, 1870, and December 1, 1873, to the comprehensive prohibition contained in section 3 of the act of the former date; and hence the appropriation for incidental expenses of district land-offices was no longer available as a source of compensation for clerical services in such offices.

In the revision of the statutes, however, the provision in the act of February 18, 1861, authorizing the employment of clerks, at a reasonable per-diem compensation, for such time as they are absolutely required to keep up the current public business, and the payment of the compensation "out of the appropriation for incidental expenses of district land-offices," was included in section 2255; and Congress has, since the revision, appropriated money each year for the "incidental expenses of district land-offices," without any prohibition of the use of it for the

purpose authorized by section 2255, namely, the payment of compensation to clerks temporarily employed. It is, therefore, a reasonable presumption that Congress intended such appropriations to be available for that purpose, and to except the case from the prohibition contained in section 3682. No such presumption of a legislative exception can arise, however, as to the application of the comprehensive requirement of section 3617; for Congress has not, since the revision, provided, either expressly or impliedly, for any use of the fees collected under section 2239 which would be in conflict with that requirement.

The annual appropriation for "incidental expenses of district land offices" is, therefore, the only source whence the clerical compensation can, pursuant to the intention of Congress, be paid.

The Commissioner of the General Land Office is advised accordingly. His inquiry is therefore answered in the negative.

TREASURY DEPARTMENT,

First Comptroller's Office, August 3, 1881.

In connection with the subject of fees collected at land-offices in the several States and Territories, and the disposition to be made thereof, it will be proper to append, in explanation of the sources of such fees, the following tables of fees and commissions prepared and issued by the General Land Office:

Table of Fees and Commissions payable at United States Land Offices in the States of Alabama, Arkansas, Dakota, Florida, Iowa, Kansas, Louisiana, Nebraska, Michigan, Minnesota, Mississippi, Missouri, and Wisconsin.

The following are the fees and commissions allowed by law in full for all services rendered by district land officers:

DECLARATORY STATEMENTS.

Pre-emption declaratory statements.....	\$2 00
Soldiers' and sailors' homestead declaratory statements.....	2 00
Coal-land declaratory statements.....	2 00

MINERAL CLAIMS AND PROTESTS.

For filing and acting upon each application for a patent.....	\$10 00
For filing and acting upon each adverse claim.....	10 00

HOMESTEAD ENTRIES.

Original Entry Fees and Commissions.

Payable when application is made.

For 160 acres, \$1.25 per acre: fees, \$10; commissions, \$4; total.....	\$14 00
For 80 acres, \$1.25 per acre: fees, \$5; commissions, \$2; total.....	7 00
For 40 acres, \$1.25 per acre: fees, \$5; commissions, \$1; total.....	6 00
For 160 acres, at \$2.50 per acre: fees, \$10; commissions, \$8; total.....	18 00
For 80 acres, at \$2.50 per acre: fees, \$5; commissions, \$4; total.....	9 00
For 40 acres, at \$2.50 per acre: fees, \$5; commissions, \$2; total.....	7 00

Final Homestead Commissions. (No fees.)

Payable when certificate issues.

For 160 acres, at \$1.25 per acre.....	\$4 00
For 80 acres, at \$1.25 per acre.....	2 00
For 40 acres, at \$1.25 per acre.....	1 00
For 160 acres, at \$2.50 per acre.....	8 00
For 80 acres, at \$2.50 per acre.....	4 00
For 40 acres, at \$2.50 per acre.....	2 00

TIMBER-CULTURE ENTRIES.

Original Entry Fees and Commissions.

Payable when application is made.

For more than eighty acres: fees, \$10; commissions, \$4; total.....	\$14 00
For 80 acres or less: fees, \$5; commissions, \$4; total.....	9 00

Final Timber-Culture Commissions. (No fees.)

Payable when certificate issues.

For each final entry, irrespective of area or price.....	\$4 00
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[There is no distinction between single and double minimum lands in timber-culture entries.]

MILITARY BOUNTY-LAND WARRANTS.

For locating a 160-acre warrant.....	\$4 00
For locating a 120-acre warrant.....	3 00
For locating an 80-acre warrant.....	2 00
For locating a 60-acre warrant.....	1 50
For locating a 40-acre warrant.....	1 00

(No fees are chargeable on warrants issued prior to February 11, 1847.)

Revolutionary bounty-land scrip is received and accounted for as cash, and no fee is chargeable to parties presenting such scrip.

AGRICULTURAL-COLLEGE SCRIP.

For each piece of 160 acres of Agricultural-College scrip located.....	\$4 00
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STATE SELECTIONS.

For each final location of 160 acres under any grant of Congress [except for agricultural colleges]	\$2 00
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RAILROAD AND OTHER SELECTIONS.

For each final location of 160 acres by railroads or other corporations.....	\$2 00
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PRIVATE-LAND SCRIP.

Valentine Scrip.

For each piece of 40 acres filed on unsurveyed lands	\$1 00
For each location of 40 acres.....	1 00

SUPREME COURT SCRIP.

For locations made in payment of Pre-emption Claims or in Commutation of Homestead Rights.

For each location of 160 acres of scrip.....	\$4 00
For each location of 80 acres of scrip.....	2 00
For each location of 40 acres of scrip.....	1 00

[No fees or commissions are allowed on the location of Supreme Court scrip, otherwise than as above stated, nor on the location of Indian scrip or other private-land scrip, except as specially provided for by law and instructions.]

REDUCING TESTIMONY TO WRITING.

Fees for reducing testimony to writing are allowed at the rate of fifteen cents for each one hundred words in the following cases only:

1. In making final proof in pre-emption cases.
2. In making final proof in homestead cases.
3. In establishing claims for mineral lands.
4. In hearings before registers and receivers in contested cases.

The same fee is also payable at district land offices when testimony in making final proof in pre-emption and homestead cases is taken before the judge or clerk of a court of record.

[No fees are allowed for reducing testimony to writing in any case of filings or applications, but only in making final proof in pre-emption and homestead cases, and in establishing claims for mineral lands when the writing is done in the local land office.

No fees are allowed for reducing testimony to writing in any case where the writing is not done by the register or receiver or by their employes, except when final homestead or pre-emption proof is taken before the judge or clerk of a court; and all fees received at United States land offices for reducing testimony to writing are to be duly reported and accounted for as in other cases.

Written words only will be computed as a basis for fee-charges in reducing testimony to writing. Printed words will not be counted.]

TRANSCRIPTS FROM RECORDS.

Registers and receivers in consolidated land districts are allowed the usual court fees authorized in such districts for making transcripts from their records for individuals.

[Consolidated districts are those districts into which one or more previously existing districts have been merged.]

CANCELLATION NOTICES.

For giving notices to contestants of the cancellation of any pre-emption, homestead, or timber-culture entry \$1 00

[This fee is payable to the register, and is the only fee allowed to be received at United States land offices that is not to be reported and accounted for.]*

CASH ENTRIES.

The commissions of registers and receivers on cash sales of the public lands are paid by the United States, and no fees or commissions on such sales are chargeable to the purchasers.

No fees, commissions, or rewards are required or allowed to be paid at United States land offices for extra services of any character whatever; and registers and receivers are absolutely prohibited by law from charging or receiving, directly or indirectly, any fee or compensation not expressly authorized by law, or for any service not imposed upon them by law, or a greater fee or compensation in any case than specifically allowed by law. Officers charging or receiving illegal fees, compensation, or gratuity are subject to summary dismissal from office, in addition to the penalties provided in Title "Crimes," chapter "Official Misconduct," United States Revised Statutes. Illegal fees received by clerks, employes, or agents are received by the land officers within the meaning and prohibitions of the law, and registers and receivers will be held personally and officially responsible therefor.

J. A. WILLIAMSON,

Commissioner of General Land Office.

WASHINGTON, D. C., *March 7, 1881.*

* Act March 14, 1880, sec. 2, (21 Stats., 141.)

Table of Fees and Commissions payable at United States Land Offices in the States and Territories of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

The following are the fees and commissions allowed by law in full for all services rendered by district land officers:

DECLARATORY STATEMENTS.

Pre-emption declaratory statements.....	\$3 00
Soldiers' and sailors' homestead declaratory statements.....	3 00
Coal-land declaratory statements.....	3 00

MINERAL CLAIMS AND PROTESTS.

For filing and acting upon each application for a patent.....	\$10 00
For filing and acting upon each adverse claim.....	10 00

TIMBER AND STONE-LAND DECLARATIONS.

For filing and acting upon each application to purchase timber or stone lands, (payable only when the entry is allowed).....	\$10 00
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HOMESTEAD ENTRIES.

Original Entry Fees and Commissions.

Payable when application is made.

For 160 acres, \$1.25 per acre: fees, \$10; commissions, \$6; total.....	\$16 00
For 80 acres, \$1.25 per acre: fees, \$5; commissions, \$3; total.....	8 00
For 40 acres, \$1.25 per acre: fees, \$5; commissions, \$1.50; total.....	6 50
For 160 acres, at \$2.50 per acre: fees, \$10; commissions, \$12; total.....	22 00
For 80 acres, at \$2.50 per acre: fees, \$5; commissions, \$6; total.....	11 00
For 40 acres, at \$2.50 per acre: fees, \$5; commissions, \$3; total.....	8 00

Final Homestead Commissions. (No Fees.)

Payable when certificate issues.

For 160 acres, at \$1.25 per acre.....	\$6 00
For 80 acres, at \$1.25 per acre.....	3 00
For 40 acres, at \$1.25 per acre.....	1 50
For 160 acres, at \$2.50 per acre.....	12 00
For 80 acres, at \$2.50 per acre.....	6 00
For 40 acres, at \$2.50 per acre.....	3 00

TIMBER-CULTURE ENTRIES.

Original Entry Fees and Commissions.

Payable when application is made.

For more than 80 acres: fees, \$10; commissions, \$4; total.....	\$14 00
For 80 acres or less: fees, \$5; commissions, \$4; total.....	9 00

Final Timber-Culture Commissions. (No Fees.)

Payable when certificate issues.

For each final entry, irrespective of area or price.....	\$4 00
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[There is no distinction between single and double minimum lands in timber-culture entries.]

DONATION CLAIMS.

For each final certificate for 160 acres..	} Reduced by act of Dec. 17, 1880. {	\$2 50
For each final certificate for 320 acres..		5 00
For each final certificate for 640 acres..		7 50

MILITARY BOUNTY-LAND WARRANTS.

For locating a 160-acre warrant.....	\$4 00
For locating a 120-acre warrant.....	3 00
For locating an 80-acre warrant.....	2 00
For locating a 60-acre warrant.....	1 50
For locating a 40-acre warrant.....	1 00

(No fees are chargeable on warrants issued prior to February 11, 1847.)

Revolutionary bounty-land scrip is received and accounted for as cash, and no fee is chargeable to parties presenting such scrip.

AGRICULTURAL-COLLEGE SCRIP.

For each piece of 160 acres of Agricultural-College scrip located	\$4 00
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STATE SELECTIONS.

For each final location of 160 acres under any grant of Congress [except for Agricultural Colleges].....	\$2 00
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RAILROAD AND OTHER SELECTIONS.

For each final location of 160 acres by railroads or other corporations	\$2 00
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PRIVATE-LAND SCRIP.

Valentine Scrip.

For each piece of 40 acres filed on unsurveyed lands.....	\$1 00
For each location of 40 acres.....	\$1 00

SUPREME COURT SCRIP.

For locations made in payment of pre-emption claims or in commutation of homestead rights.

For each location of 160 acres of scrip.....	\$4 00
For each location of 80 acres of scrip.....	\$2 00
For each location of 40 acres of scrip.....	\$1 00

[No fees or commissions are allowed on the location of Supreme Court scrip, otherwise than as above stated, nor on the location of Indian scrip or other private-land scrip, except as specially provided for by law and instructions.]

REDUCING TESTIMONY TO WRITING.

Fees for reducing testimony to writing are allowed at the rate of 22½ cents for each one hundred words in the following cases only:

1. In making final proof in pre-emption cases.
2. In making final proof in homestead cases.
3. In establishing claims for mineral lands.
4. In hearings before registers and receivers in contested cases.

The same fee is also payable at district land offices when testimony in making final proof in pre-emption and homestead cases is taken before the judge or clerk of a court of record.

[No fees are allowed for reducing testimony to writing in any case of filings or applications, but only in making final proof in pre-emption and homestead cases, and in establishing claims for mineral lands when the writing is done in the local land office.

No fees are allowed for reducing testimony to writing in any case where the writing is not done by the register or receiver or by their employés, except when final homestead or pre-emption proof is taken before the judge or clerk of a court; and all fees received at United States land offices for reducing testimony to writing are to be duly reported and accounted for as in other cases.

Written words only will be computed as a basis for fee-charges in reducing testimony to writing. Printed words will not be counted.]

TRANSCRIPTS FROM RECORDS.

Registers and receivers in consolidated land districts are allowed the usual court fees authorized in such districts for making transcripts from their records for individuals.

[Consolidated districts are those districts into which one or more previously existing districts have been merged.]

CANCELLATION NOTICES.

For giving notices to contestants of the cancellation of any pre-emption, homestead, or timber-culture entry \$1 00

[This fee is payable to the register, and is the only fee allowed to be received at United States land offices that is not to be reported and accounted for.]

CASH ENTRIES.

The commissions of registers and receivers on cash sales of the public lands are paid by the United States, and no fees or commissions on such sales are chargeable to the purchasers.

No fees, commissions, or rewards are required or allowed to be paid at United States land offices for extra services of any character whatever; and registers and receivers are absolutely prohibited by law from charging or receiving, directly or indirectly, any fee or compensation not expressly authorized by law, or for any service not imposed upon them by law, or a greater fee or compensation in any case than specifically allowed by law. Officers charging or receiving illegal fees, compensation, or gratuity, are subject to summary dismissal from office, in addition to the penalties provided in title "Crimes," chapter "Official Misconduct," United States Revised Statutes. Illegal fees received by clerks, employes, or agents, are received by the land officers within the meaning and prohibitions of the law, and registers and receivers will be held personally and officially responsible therefor.

J. A. WILLIAMSON,

Commissioner of General Land Office.

WASHINGTON, D. C., March 7, 1881.

IN THE MATTER OF FIXING THE COMPENSATION DUE TO DISTRICT ATTORNEYS FOR SERVICES RENDERED IN THE INVESTIGATION OF CASES OF VIOLATION OF INTERNAL-REVENUE LAWS.—LEAKE'S CASE.

1. Section 838 of the Revised Statutes authorizes the Secretary of the Treasury to make discretionary compensation, as distinguished from compensation fixed by fees, for services rendered by district attorneys in "any case in which any fine, penalty, or forfeiture has been incurred * * * for the violation of any law of the United States relating to the revenue."
2. The terms of this provision apply to all civil, criminal, or special statutory forms of proceeding for the recovery of any fine, penalty, or forfeiture incurred in cases reported to the district attorney by collectors of internal revenue and collectors of customs. The words are general, and in a statute of this character they are to be construed in a comprehensive sense.
3. It is a principle of law that where the words of a statute prescribing compensation to a public officer are loose or obscure, and admit of two interpretations, the construction ought to be that which is the more favorable to the claims of the officer.
4. On the same principle, when there are several statutes affecting the right of an officer to compensation, and one of them, general in terms, allows him compensation, it should, in the absence of a reasonably clear intention of Congress to limit its sense, be construed as fixing his right to the compensation without regard to any indefiniteness in the other statutes.

5. When the object of a statute is to give an officer compensation, it should, in construction, be extended to all cases within the reason and purpose of the statute, so far as necessary to remedy the evil it was designed to meet.
6. The expression "fine, penalty, or forfeiture," when used in a statute, must be understood to mean a pecuniary fine or penalty, or a forfeiture of property. The word "fine" in section 838 of the Revised Statutes means also a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor; and the word "forfeiture," a judicial transfer of title to property as punishment for crime. The term "penalty" is, in criminal law, mostly applied to a fixed pecuniary punishment inflicted for a violation of law.
7. A district attorney who has rendered services in the investigation or prosecution of cases under section 3451 of the Revised Statutes, reported to him by a collector of internal revenue, is not entitled to compensation other than as provided for in the regular fee-bill, unless such services had in view a forfeiture of property.
8. The expression in section 838 of the Revised Statutes, "the violation of any law of the United States relating to the revenue," clearly includes acts done in violation of revenue statutes in which there are no penal provisions, whenever such acts render the guilty party liable by force of any other statute to a "fine, penalty, or forfeiture."
9. When, therefore, a collector of internal revenue reports to the district attorney violations of internal-revenue laws for which no fine, penalty, or forfeiture is provided in the Revised Statutes under TITLE XXXV, INTERNAL REVENUE, but for which proceedings for the recovery of fines, penalties, or forfeitures may be maintained under other provisions of law, the district attorney is, for services rendered in such cases, entitled to the compensation authorized by section 838 of the Revised Statutes.
10. When a statute, relating exclusively to the revenue, or when an authorized regulation made under such statute, requires an oath to be taken, and such oath is taken falsely and corruptly, or when there is a conspiracy to violate such law or regulation, the penal provisions of other statutes which prescribe punishment for perjury or conspiracy are, when put in operation against perjurers or conspirators in matters so arising under a revenue law, provisions of laws "relating to the revenue" within the meaning of section 838 of the Revised Statutes.
11. Section 5600 of the Revised Statutes prescribes that no legislative construction is to be drawn by reason of the title under which any section of the laws therein compiled is placed. When it is necessary to construe doubtful language used in the revision, reference may be made to the original statutes from which sections of the Revised Statutes were taken.
12. Sections 5392, 5393, and 5440 of the Revised Statutes are, in so far as they provide punishment for acts done against the revenue, laws "relating to the revenue" within the meaning and for the purposes of section 838. A criminal statute may "relate to the revenue," although the revenue law does not by itself declare the acts for which the criminal statute provides punishment to be criminal offences.
13. In the case of *United States vs. Hirsch* (100 U. S., 33) the question was, whether a conspiracy in violation of section 5440 of the Revised Statutes was "a crime arising under the revenue laws;" and it was held that it was not. In the case

now under consideration the question is not whether the fine, penalty, or forfeiture was incurred *under* the revenue laws, but whether it was incurred under any law "*relating to the revenue.*"

14. When services have been rendered by a district attorney as directed in section 838 of the Revised Statutes, the fact that no legal proceedings have been instituted, or that a prosecution has failed, does not affect his right to compensation in a case reported to him by the collector in which there is a liability to a fine, penalty, or forfeiture.

August 3, 1881, Joseph B. Leake, esq., United States attorney for the northern district of Illinois, presented to the Commissioner of Internal Revenue, for allowance, an account for \$1,500 against the United States, "for legal services in the inquiry, examination, and *preparation for trial* [but not for trial itself] in the district court of the United States for said district for cases known as the 'Match-bond cases.'" There were nine indictments registered in November, 1879, against different parties, containing counts as follows: two having each one count under section 3451 of the Revised Statutes, and one count under section 5440; one having a count under section 3451, and a count under section 5393; and six having each one count under section 3451, and one count under section 5392. The cases were tried during the period between October, 1880, and June, 1881, and resulted in five convictions on the counts. The verdict in four of these cases was guilty only under the count on section 5392, and in the other case guilty on the count under section 5393. Evidence was introduced in each case under the counts on section 3451, but before the cases went to the jury a *nolle prosequi* was entered as to these counts, because of a doubt as to whether the "schedule" to the bond set out in the indictments was within the words "other document" in that section. The indictments under sections 3451 and 5392 were only against the sureties in the bond given under section 3425. The two indictments under sections 3451 and 5440 were tried only on the conspiracy count under section 5440, and resulted in each case in a verdict of not guilty. Some of the defendants, having fled the country, have not yet been tried.

The district attorney says, in support of his claim for compensation under the provision of section 838 of the Revised Statutes:

"These cases originated as follows: Under the proviso of section 3425, Rev. Stats., the Commissioner of Internal Revenue was authorized to sell to any manufacturer of friction-matches a suitable quantity of adhesive stamps without prepayment therefor, on a credit not exceeding sixty days, requiring, in advance, such security as he may judge necessary to secure payment therefor to the Treasurer of the United States.

"Under sections 251 and 321 the Secretary of the Treasury and the

Commissioner of Internal Revenue were empowered to prescribe all necessary forms of entries, oaths, regulations, blanks, &c., necessary for the execution and enforcement of the internal-revenue laws and pertaining to the assessment and collection of the internal revenue. Under the authority of these laws it was prescribed by the Secretary and Commissioner that when such manufacturer should apply for credit, he should be required to execute a bond with sureties in a sufficient penalty to secure the Treasury, and, as a part of such security, a form was prescribed upon which each surety offered should make a schedule of his property, and state his liabilities, and make oath to the same. All these requirements, including that of the oath, are made *laws relating to the internal revenue*.

"The violations of law, in the cases under consideration, were reported to the district attorney by the collector of internal revenue for the first district of Illinois, and consisted in the concoction of a scheme to have irresponsible persons represented to be manufacturers of matches, and, as such, to have them execute bonds with irresponsible sureties, which sureties made false and fictitious schedules of property, making oath to the same, and thereby misleading the proper officers to approve of the bonds and security.

"Under these schemes, the three several bonds of James Fitzgerald, Phineas Ayer, and Charles N. Wheeler, with sureties for each, were approved, and stamps obtained to about the value of eighty thousand dollars, which were taken possession of by the conspirators, secretly disposed of, and the Government defrauded of the entire amount. The frauds were perpetrated against the internal revenue, under the forms of the internal-revenue laws, and were reported by a collector of internal revenue, to have the 'proper proceedings instituted' to punish the offenders."

July 20, 1881, the account of the district attorney, for his services in these cases, was duly certified by the judge before whom the cases were tried or disposed of, and it was approved in open court, in the sum of \$1,500. (Rev. Stats., 838; Act of February 22, 1875, 18 Stats., 333.)

August 3, 1881, the Commissioner of Internal Revenue transmitted the account to the Secretary of the Treasury, and recommended that it be paid from the appropriation "for agents and sub-officers of internal revenue," &c., for the fiscal year 1881, subject, however, to the condition that the Secretary be of opinion that these proceedings were for the violation of any law of the United States *relating to the revenue* in a case in which "any fine, penalty, and forfeiture was incurred within the meaning of section 838 of the Revised Statutes;" and United States *vs. Hirsch* (100 U. S., 33) was cited as, perhaps, bearing on the question.

August 3, 1881, the account was approved by the Secretary, "subject to the decision of the First Comptroller, as to whether the services were rendered in such class of cases as to establish a claim to payment under section 838 of the Revised Statutes;" and, with this qualified approval, he referred the account to the First Comptroller.

August 8, 1881, Mr. Leake made an able oral argument before the First Comptroller, and submitted a brief in support of his claim:

"Section 5392 and section 5440 stand in the revision under the title 'Crimes,' and are not found under the title of 'Internal Revenue;' and I think it is from this fact alone that any question can arise as to whether these prosecutions were under a law relating to revenue. Each one of the sections was *enacted as part of the internal-revenue laws*, and remained such until the revision, when, 'for the purpose of a more convenient and orderly arrangement of the same,' (Rev. Stats., 5600,) they were arranged under the title of 'Crimes.' Section 5392 is identical with section 42 of the internal-revenue act of June 30, 1864, vol. 13, Statutes at Large, p. 239, so that the crime of perjury, when the oath was required to be taken under the internal-revenue law, was a violation of that law. Section 5440 was originally enacted as part of the internal-revenue act of March 2, 1867, vol. 14, Statutes at Large, p. 484, sec. 30, and so remained until the revision. They still prescribe the only punishment for such crimes against the internal revenue. The rule of construction is prescribed by section 5600, which enacts that 'no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed,' so that the fact that these sections are not now arranged under the title 'Internal Revenue,' but are arranged under that of 'Crimes,' cannot raise the presumption or inference that the prosecutions for those offences, when committed against the internal revenue, do not still remain prosecutions for fines and penalties under a revenue law.

"The decision in 10 Otto, p. 33, was on a question under the statute of limitations as to the time within which an indictment should be found. The attention of the court does not appear to have been called to the rule of construction laid down in section 5600, and the effect of that section was not considered by the court. The decision of the court was in favor of liberty, and gave the strictest construction in favor of the defendant, as is the rule in the construction of all criminal laws. The court, however, said further: 'It must be admitted that in construing any part of the Revised Statutes it is admissible, and often necessary, to refer to its connection in the act of which it was originally a part.' This is such a case, where it is necessary to recur to the original acts in order that injustice shall not be done. In making the revision, Congress made no change in the law. The penalties prescribed, duties imposed upon district attorneys, and section 838, about compensation, all are just the same as before. In the light of section 5600, can it be claimed that by the new arrangement the claim to compensation is taken away? Now, as before, the collectors of internal revenue report these cases to the district attorneys to prosecute as violations of the internal-revenue law, under section 838; and district attorneys still render the services as required. Such cases are still treated as internal-revenue cases, under the direction of the Commissioner of Internal Revenue; reports are made to him, and he exercises the right to control, &c. In such cases the rules of construction of civil law in favor of those doing work and labor, and not the strict construction of the criminal law in favor of those charged with crimes, should be applied. A construction which would deprive an officer of the Government of the compensation intended by law for his services should not be adopted, unless a construction favorable to payment cannot be made without violence to

language under both sections. The necessary allegations all specifically refer to violations of the internal-revenue law. The prosecutions were for fines and penalties. Under both sections a pecuniary fine or penalty is imposed, together with imprisonment. The proportion of each is for the court, and not the district attorney. I claim, then, that these prosecutions, by necessary implication, do relate to a revenue law, and are for a fine and penalty, and that all intendments are in favor of payment for services rendered in them."

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The Revised Statutes contain provisions under "titles" as follow:

TITLE XIII.—THE JUDICIARY.

SEC. 838. It shall be [the] duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any *fine, penalty, or forfeiture* has been incurred in the district of such attorney, for the violation of any law of the United States *relating to the revenue*, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, *and in internal-revenue cases to the Commissioner of Internal Revenue for their direction*. And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of: *Provided*, That the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment.

TITLE XXXV.—INTERNAL REVENUE.—CH. 11.

SEC. 3445. Every person who simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal-revenue laws, or by any regulation made in pursuance thereof, or who procures the same to be falsely or fraudulently executed, or who advises, aids in, or connives at such execution thereof, shall be imprisoned for a term not less than one year nor more than five years; and the property to which such false or fraudulent instrument relates shall be forfeited.

TITLE LXX.—CRIMES.—CH. 4, 5.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully

and contrary to such oaths states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

SEC. 5393. Every person who procures another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed.

SEC. 5440. If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years.

And see section 3214.

TITLE LXXIV.—REPEAL PROVISIONS.

SEC. 5600. The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title, under which any particular section is placed.

In the cases for which a compensation of \$1,500 is asked, the offences charged were duly reported by the collector of internal revenue to the district attorney, under the provisions of section 838 of the Revised Statutes. The attorney of the United States is not entitled to any allowance under section 838 for services at *the trial* of the indictments found on these charges, because the statute prescribes the fees for that service. (Rev. Stats., 824; House Ex. Doc. No. 27, 2d Sess., 45th Cong., January 11, 1878, p. 33.) The legal services for which compensation is claimed consisted in the examination and preparation of the "Match bond cases," preliminary to the trial of the charges preferred in those cases under sections 3451, 5392, 5393, and 5440 of the Revised Statutes.

It is necessary to ascertain the condition under which compensation for the services rendered can be lawfully paid under section 838, and whether such condition exists in the case submitted.

Section 838 authorizes discretionary compensation, as distinguished from compensation fixed by fees, for services rendered by district attorneys in "any case in which any fine, penalty, or forfeiture has been incurred * * * for the violation of any law of the United States relating to the revenue."

If it were a new question, it might well be insisted that the word "fine," as used in this section, does not mean a fine with or without imprisonment, such as is provided for in criminal laws.

In support of this view, section 9, of the act of July 13, 1866, (14 Stats., 145, 146; Rev. Stats., 3214,) may be cited, which makes it the duty of the collector to institute suit "in any proper form of action" for the recovery of all "fines, penalties, and forfeitures." This section provides (14 Stats., 146) that nothing therein contained "shall be construed to limit or affect the power of remitting the whole or any portion of a fine, penalty, or forfeiture conferred on the Secretary of the Treasury by existing laws." (See, in respect of this authority of the Secretary, sections 5292-5295 of the Revised Statutes.) As Congress could not vest the pardoning power in the Secretary, as the President cannot delegate it, and as nothing short of that power can effect the remission of a fine provided for in the law under which criminal proceedings are instituted, it is obvious that the word "fine" in the act of 1866 must be construed to mean a sum of money which can be recovered in a civil action, and for the recovery of which it is not necessary to establish by any criminal proceedings liability on the part of the defendant. (*Raymond vs. United States*, 14 Blatch. C. C., 52; *United States vs. Clafin, Id.*, 55.)

With this understanding of the word "fine," it would follow that section 838 was intended to take away discretionary power from the collector as to instituting suits in such case, and to make it his duty to report to the district attorney the cases in which fines, penalties, and forfeitures are incurred, instead of directly instituting a civil action therefor, (3 Op. Att.-Gen., 248,) and, on report made, to authorize the district attorney to institute suits for recovery of the amounts forfeited. The meaning here attached to the word "fine" appears clearly in the use made of the word in sections 5292-5296 of the Revised Statutes. If it be a correct proposition of law that Congress cannot vest any part of the pardoning power in a circuit-court commissioner, section 5296 is of doubtful constitutionality. As the construction here given to section 838, which makes the word "fine" apply to criminal proceedings, is of long standing, it should not and will not be changed, since it is immaterial to the Government whether "fines" be recovered in civil actions or by criminal proceedings.

The words "case in which any fine, penalty, or forfeiture has been incurred" may, under the construction referred to, be understood as relating to all civil, criminal, or special statutory forms of proceeding for the recovery of any fine, penalty, or forfeiture. The words are general, and in a statute of this character they are to be construed in a comprehensive sense. *Generalia verba sunt generaliter intelligenda*. This construction is especially applicable in respect of the matter under consideration, since it is a principle of law that where the words of a

statute prescribing compensation to a public officer are loose or obscure, and admit of two interpretations, the construction ought to be that which is the more favorable to the claims of the officer. (United States *vs.* Morse, 3 Story, C. C., 87, 91; Moore *vs.* United States, 4 Ct. Cls., 139.) On the same principle, when there are several statutes affecting the right of an officer to compensation, and one of them, general in terms, allows him compensation, it should, in the absence of a reasonably clear intention of Congress to limit its sense, be construed as fixing his right to the compensation, without regard to any indefiniteness in the other statutes.

When the object of a statute is to give an officer compensation, it should, in construction, be extended to all cases within the reason and purpose of the statute, so far as necessary to remedy the evil it was designed to meet.

The Barons of the Exchequer resolved in Heydon's case that in the construction of remedial laws four things are to be considered: (1) the old law, (2) the mischief and defect which the statute was designed to remedy, (3) what remedy the statute has provided, and (4) the true reason of the remedy. (3 Rep., 7.) The maxim *Ubi lex est specialis et ratio ejus generalis, generaliter accipienda est*, is only a part of the same principle. (2 Inst., 33; Potter's Dwarries, 187; Sedgwick, Stat. and Const. L., ch. vii, p. 250, *et seq.*; Holiday case, 1 Lawrence, Compt. Dec., 31.)

It being clear that section 838 authorizes special compensation to district attorneys in the case therein provided for, the next inquiry is: Do violations of sections 3451, 5392, 5393, and 5440 of the Revised Statutes subject the offenders to any (1) fine, (2) penalty, or (3) forfeiture, within the meaning of section 838?

All these sections, being penal, are to be strictly construed.

1. As to section 3451:

The principal and sureties on a bond executed for a fraudulent purpose, under the proviso to section 3425 of the Revised Statutes, might be indicted under section 3451. If the stamps procured on such fraudulent bond or the matches on which they were used could be reached, they might be made the subject of forfeiture. But it does not appear in the present case that any services were rendered by the district attorney with a view to such forfeiture. Section 3451 prescribes only imprisonment and "forfeiture" as a punishment for its violation; it does not prescribe a "fine" or "penalty" within the meaning of section 838. When the expression "fine, penalty, or forfeiture" is used in a statute, it must be understood to mean a pecuniary fine or penalty, or a forfeiture of property. The word "fine" in section 838 means a pecu-

niary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor, (Gabbett's Crim. Law, vol. 2, p. 606;) and the word "forfeiture" means a judicial transfer of title to property as punishment for crime. (Tomlin's Law Dict., "Penalties" and "Forfeitures;" Bouv. Dic., Fine; Forfeiture; Cruise's Digest, Fines; Shep. Touch., Fine; 3 Bacon, Abr., Fines and Recoveries; Const. Amendt., art. VIII; 2 Blackst. Comm., 267; *Anglea vs. Commonwealth*, 10 Gratt. Va., 700; Const., art. III, sec. 3, cl. 2; Act April 10, 1790, sec. 32, 1 Stats., 119; 1 Washburn, Real Prop., 92.) The word "penalty" in its general acceptation is more comprehensive than the words "fine" and "forfeiture." But it is to be construed with "fine" and "forfeiture," as a part of the expression "fine, penalty, and forfeiture." It is to be construed in the light of the maxim *Noscitur à sociis*.

The term "penalty" is, in criminal law, mostly applied to a fixed pecuniary punishment inflicted for a violation of law. (*Maclin et al. vs. Wilson*, 21 Ala., N. S., 672; Bouv. Dic., tit. Penalty; *McLane vs. The United States*, 6 Pet., 423; *Taylor vs. Sandiford*, 7 Wheat., 17, 18; *United States vs. Morris*, 10 *Id.*, 291; *Boutelle vs. Nourse*, 4 Mass., 433.) It is clear that section 3451 does not prescribe a "fine" or "penalty" within the generally understood meaning of these terms as used in section 838. So far, therefore, as the claimant rendered services in the investigation or prosecution of these cases, under section 3451, before the trial of the indictment, it is not shown that he is entitled to compensation other than as provided for in the regular fee bill, (Rev. Stats., 824,) for the reason, as already stated, that no services having in view a forfeiture of property appear to have been rendered.

2. As to section 5392:

This section requires in terms "a fine of not more than two thousand dollars" to be imposed on parties convicted under its provisions. A case in which this fine is incurred may or may not be one within the meaning of section 838. When, as in the cases investigated under section 5392, the offences were such as should be reported by the collector of internal revenue to the district attorney, one of the conditions precedent to a right to compensation under section 838 is fully supplied.

3. As to section 5393:

A case prosecuted under this section is precisely, in effect, and for the purposes of the present inquiry, in the same condition as one prosecuted under section 5392.

4. As to section 5440:

This section in clear terms imposes a pecuniary "penalty of not less than one thousand dollars * * * ." If the offence is one against a

revenue law, then the word penalty in this section is within the intention of section 838. This leads to an inquiry into the nature of the offences prosecuted under section 5440.

Were such acts as would subject the defendants to any fine, penalty, or forfeiture for the violation of any law *relating to the revenue* charged in the indictments found under section 5440?

Such acts must be either a "violation" of a law relating to the revenue which prescribes a fine, penalty, or forfeiture, or of a revenue law which does not in itself prescribe a fine, penalty, or forfeiture, but for which violation there is a fine, penalty, or forfeiture prescribed by some other statute which may, or may not, according to the nature of the acts done, be considered as "a law relating to the revenue."

In considering this subject, it is necessary to refer to another statute. Section 3425 of the Revised Statutes, which authorizes the Commissioner of Internal Revenue to sell and supply to persons therein named adhesive stamps or stamped paper, on payment at the time of delivery, contains the following *proviso*:

"That the Commissioner may, from time to time, deliver to any manufacturer of friction or other matches, cigar-lights, or wax-tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring, in advance, such security as he may judge necessary to secure payment therefor to the Treasurer of the United States, within the time prescribed for such payment. And upon all bonds or other securities taken by said Commissioner, under the provisions of this chapter, suits may be maintained by said Treasurer in the circuit or district court of the United States, in the several districts where any of the persons giving said bonds or other securities reside or may be found, in any appropriate form of action."

And see section 3214.

Duly authorized regulations were made, and appropriate forms were prescribed, to execute this statute.* A party who procures by false representations the stamps referred to in this section, violates its provisions and the regulations under it. All persons who make or who aid and abet in making such false representations equally violate its provisions. The statute contemplates a delivery of stamps without prepayment only on a truthful showing as to the "security" required under it. False swearing as to such security would be a violation of this law, whether

*The Additional Regulations and Instructions of September 10, 1879, Series 7, No. 7, Supplement No. 2 Revised, prescribed by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, provide, page 40: "Sureties will be required to justify on Form 33a, and will state the value of their real estate and the amount of their liability as sureties on other bonds. In cases where parties are already liable as sureties to the full value of the real estate owned by them, collectors will refuse to accept them as sureties on new bonds until they are released from responsibility by the cancellation of the old bonds."

there be a punishment prescribed for it or not. Stamps obtained on such security would be fraudulently procured, and they could be recovered by an action in replevin. It is the duty of the proper district attorney to conduct such replevin suit when he has knowledge of the facts. (Rev. Stats., 771.) The statute prescribes his fees therefor. (Rev. Stats., 824.) The cause of action in the case of such suit would be the violation of a revenue law of the United States, to wit, of the proviso to section 3425 and of the "regulations" made to carry it into effect, which are in contemplation of law a part of the proviso itself.

Congress, in enacting section 838 of the Revised Statutes, had, doubtless, in view acts which constitute violations of the revenue laws, and intended a vigilant protection of the Government revenue by providing in said section that "it shall be the duty of every district attorney to whom any collector of * * * internal revenue shall report * * * *any [such] case* in which any fine, penalty, or forfeiture has been incurred [under other and criminal statutes] for the violation of any law of the United States [the proviso to section 3425] *relating to the revenue*, to cause the proper proceedings *to be commenced and prosecuted without delay* for the fines, penalties, and forfeitures;" and it then provides special compensation for the services rendered by the district attorney in such cases. The expression in section 838 of the Revised Statutes, "the violation of any law of the United States *relating to the revenue*," clearly includes acts done in violation of revenue statutes in which there are no penal provisions, whenever such acts render the guilty party liable by force of *any other statute* to a "fine, penalty, or forfeiture."

The acts alleged in the cases for which compensation is claimed constituted a violation of the revenue law proper, which requires an oath, and, of course, a true oath, in respect to the security offered for the stamps advanced without prepayment. Section 3425 was the law which was violated. Perjury in respect of any matter relating to the bond or other security offered in order to obtain stamps, violates that law, whether there be a perjury statute for the punishment of the violation or not. The perjury statute is only material to the present inquiry with a view to ascertain whether there is a liability for "any fine, penalty, or forfeiture * * * for the violation [not of it, but] of any [other] law of the United States relating to the revenue." The perjury statute authorizes the punishment of every person who is guilty of perjury "in any case in which a law of the United States authorizes an oath to be administered." The revenue laws authorized the oath to be administered in the match bond cases. It was prescribed by a lawful regulation under section 3425. If there be a criminal statute specially and only "relating to the revenue," it would, doubtless.

be, within section 838, a law "relating to the revenue." But when, as in the present cases, there is a statutory provision for the punishment of perjury and subornation of perjury, even though it were not originally enacted in a revenue statute, but only as a part of the general criminal statutes, and a party is guilty of perjury or subornation of perjury by having falsely taken, or procured to be falsely taken, an oath required by the revenue laws, or by authorized regulation thereunder, the offence is, in the very language of section 838, a "violation of [a] * * * law of the United States *relating to the revenue*." It follows, therefore, that when a statute, relating exclusively to the revenue, or when an authorized regulation made under such statute, requires an oath to be taken, and such oath is taken falsely and corruptly, or when there is a conspiracy to violate such law or regulation, the penal provisions of other statutes which prescribe punishment for perjury or conspiracy are, when put in operation against perjurers or conspirators in matters so arising under a revenue law, provisions of laws "relating to the revenue" within the meaning of section 838 of the Revised Statutes.

The question is not whether for all purposes sections 5392, 5393, and 5440 are laws "relating to the revenue," but only whether they are such for the purpose of allowing compensation, within the meaning of the language employed, or the evident intention of Congress, in section 838. If the language of this section is obscure or doubtful, it is, upon principles already stated, to be construed liberally in favor of the officer claiming compensation thereunder.

Section 5600 of the Revised Statutes prescribes that no legislative construction is to be drawn by reason of the title under which any section of the laws therein compiled is placed. The fact that a section is under the title "Crimes" does not, therefore, necessarily imply that for some purposes it is not a "law" "relating to the revenue." When it is necessary to construe doubtful language used in the revision, reference may be made to the original statutes from which sections of the Revised Statutes were taken. (*United States vs. Bowen*, 100 U. S., 508; *United States vs. Hirsch*, *Id.*, 35; *United States vs. Dustin*, 15 Internal-Revenue Record, 30.)

Sections 5392, 5393, and 5440 of the Revised Statutes are, in so far as they provide punishment for acts done against the revenue, laws "relating to the revenue" within the meaning and for the purposes of section 838. This conclusion is aided, perhaps, by the fact that perjury was made a crime as to internal-revenue matters by section 42 of the act of June 30, 1864, (13 Stats., 239,) which was clearly a law "relating to the revenue." The same may be said of section 5440,

whose original is, in substance, found in the revenue act of March 2, 1867. (14 Stats., 484, sec. 30.) If the prosecutions for perjury or conspiracy had been instituted before the Revised Statutes were enacted, June 22, 1874, it is clear that the statutes punishing these crimes must have been held to be laws "relating to the revenue," because they would then have been actually found in the revenue laws. The revision was not intended to change any law. It is declared therein that it embraces the statutes, general and permanent in their nature, in force on the 1st day of December, 1873, as revised and consolidated. (Rev. Stats., 5595.) The perjury statute, (sections 5392, 5393,) when resorted to, as in this case, in a matter "relating to the revenue," is a "law of the United States relating to the revenue." It must relate to something. If, in such case, it does not relate to the revenue, to what does it relate? When it is resorted to for the prosecution of persons who have sworn falsely in relation to entries of public lands, it is *quoad hoc* a law relating to that subject. If it does not relate to that subject, how can it be invoked at all? (See 14 Op. Att.-Gen., 384.)

Similarly, when the conspiracy statute is resorted to for the prosecution of parties who have conspired to defraud the United States of customs duties or internal taxes, it is a law relating to the revenue of the United States.

Nothing said in this case in the least conflicts with the opinion of the Supreme Court in *United States vs. Hirsch*, (100 U. S., 33.) *Hirsch* had been indicted for conspiracy, under section 5440, to defraud the United States out of duties. Section 1046 prescribed a limitation to prosecutions "for any crime arising under the revenue laws." The court held that this limitation did not apply in that case, because it was not, as the statute required, a "crime arising under the revenue laws." These are the words construed. The words to be now construed, under section 838, are, "any law * * * relating to the revenue." A criminal statute may "relate to the revenue," although the revenue law does not by itself declare the acts for which the criminal statute provides punishment to be criminal offences. Nothing is said by the court as to the effect of strict construction. A statute defining crime is to be construed strictly; but whether a statute of limitations for criminal causes is to be strictly construed, presents a different question.

In *United States vs. Hirsch* the question was, whether a conspiracy in violation of section 5440 of the Revised Statutes was "a crime arising *under* the revenue laws;" and it was held that it was not. In the case now under consideration the question is not whether the

fine, penalty, or forfeiture was incurred *under* the revenue laws, but whether it was incurred under any law "*relating* to the revenue." Admitting that in the indictments for conspiracy referred to "*the gravamen* of the offence is the conspiracy," (100 U. S., 34,) it does not follow that cases of conspiracy to defraud the revenue, by acts in contravention of the revenue laws, cannot be prosecuted under section 5440, or that in such cases this section is not a law "*relating* to the revenue." Clearly, in all such cases, this section does relate to fraudulent conspiracies against the revenue, and hence it *relates* to the revenue—to the revenue laws which the conspirators violated. Section 5440 must of necessity relate to some other section of the law which has been, or been attempted to be, or sought to have been, violated, else there can be no valid indictment found under it for conspiracy against the United States. Some other law must show that the acts done constitute an *offence* or *fraud* against the United States. If this cannot be done, the indictment must be quashed. Clearly, therefore, section 5440 is, within the meaning of section 838, a law *relating* to the revenue whenever it is invoked in aid of the revenue.

When services have been rendered by a district attorney as directed in section 838, the fact that no legal proceedings have been instituted, or that a prosecution has failed, does not affect his right to compensation in a case reported to him by the collector in which there is a liability to a fine, penalty, or forfeiture.

The result is that, as to so much of the \$1,500 claimed as represents the services rendered under section 3451, the district attorney in the present case does not appear to be entitled to payment; but for the services rendered under sections 5392, 5393, and 5440 he is entitled to compensation. The allowance made by the court is for a gross sum for the entire services. If the court had made an allowance, with items in each case, the accounting officers of the Treasury Department could now, on such allowance, state an account, and certify a balance for payment. This mode of allowance may, generally, be the better one to adopt. But the statute requires the allowance of the court for the services for which the accounting officers authorize payment. (Rev. Stats., 846; Act February 22, 1875, 18 Stats., 333.) The claimant should produce the allowance of the court for the services under sections 5392, 5393, 5394, and 5440 of the Revised Statutes which were rendered in the cases under consideration.

TREASURY DEPARTMENT,

First Comptroller's Office, August 10, 1881.

IN THE MATTER OF THE LEGALITY OF EXPEDITING THE STAR-ROUTE MAIL SERVICE AT A RATE OF PAY EX- CEEDING FIFTY PER CENTUM OF THAT STIPULATED IN CONTRACT AS ORIGINALLY LET.—STAR-ROUTE CASE.

1. The postal-deficiency appropriation act of April 7, 1880, (21 Stats., 71,) contains a *proviso* that the Postmaster-General should not thereafter have the power to expedite the service under any contract either then existing or thereafter to be ~~g~~ given "to a rate of pay exceeding fifty per centum upon the contract as originally let."
2. On a contract originally let for carrying the mail once in each week in thirty-four hours, for \$699 per annum, and on which the service was subsequently "increased" four trips, making in all five per week, and the time "expedited" to eighteen hours per trip, the contractor is entitled to compensation at the rate of \$699 per annum for each of the five trips per week; but for the *expedited* service he can, for all the trips together, receive compensation in gross only at the rate of 50 per cent. on the original contract for one trip, namely, on \$699.
3. When an original contract is made for carrying the mail on any route for one trip a week, and the Postmaster-General subsequently requires two or more trips a week, the additional trips are called "*increased*" or "*additional*" service. When such contract requires a trip to be made on a route in, say, thirty-four hours, and it is modified by an order of the Postmaster-General requiring the trip to be made in eighteen or any less number of hours, the service rendered under the modified contract is called "*expedited*" service.
4. In construing a statute four things are to be considered: (1) The prior law, (2) the mischief and defect for which it did not provide, (3) the remedy the later statute has provided, and (4) the true reason of the remedy. Prior to the act of April 7, 1880, the law conferred large discretionary powers on the Postmaster-General in respect of making extra allowances for expedited service. This was deemed by Congress an evil.
5. The purpose of the *proviso* in that act was to limit and reduce the powers previously exercised by the Postmaster-General under the Revised Statutes; it is, therefore, the duty of the proper accounting officers of the Treasury to construe it so as to meet the mischief intended to be guarded against and advance the remedy provided.
6. In the case of statutes which relate to matters of public utility, and are intended to remedy some existing mischiefs, the construction should be such as to suppress the mischiefs and render the remedies effectual.
7. When the Government has in its custody money due to a claimant, there is, as a general rule, a right and a duty on the part of the proper accounting officers to apply it, or such part thereof as may be necessary, by way of set-off, as a credit on any equal amount due the United States from such claimant.
8. A settled account is only *prima facie* evidence of its correctness at law or in equity; it may be impeached for fraud or mistake. An account already *settled* cannot be reopened by accounting officers by reason of fraud or mistake of law.

9. Where an illegal credit or allowance has been made in an account, it is held that the judicial tribunal must be resorted to to construe the law and settle the rights between the United States and the party to whom the allowance was made or credit given.
10. It is usual in the contracts of the United States to make quarterly or monthly payments; but this is for the convenience of the contractors, and the provisions for it in the contract are to be construed in reference to that practice only. Such payments are made subject to a final settlement, and not as payments (each) of so much work done.
11. With respect to a mail contractor's quarterly account, it might be urged with some force that it is not *settled* in a legal sense until his contract is *fully* performed, and that quarterly adjustments are mere *rests* in the account. Against this view, however, the statutory provisions in respect of postal accounts raise strong presumptions that the quarterly settlements of the mail contractor's accounts are final and conclusive on the executive branch of the Government.

George Allman contracted with the Post-Office Department to carry the mails for four years from June 30, 1878, on route 46210, California, a distance of sixty-three miles, making a trip on each of six days in every week, for \$4,490 per annum, and on route 46211, California, one trip each week, for \$699 per annum. The service on each route was increased by order of the Postmaster-General so as to require a trip to be made each day.

February 21, 1881, the Postmaster-General made the order as to route 46210, as follows:

"1st. From February 22, 1881, increase service one trip per week, and allow contractor \$748.33 per annum additional pay, being pro rata.

"2d. Reduce running time from thirty-six (36) hours to twenty-eight (28) hours, and allow contractor \$2,619.16 per annum additional pay, being fifty per centum of original cost of service, but less than pro rata, as shown by carrier's sworn statement."

February 25, 1881, the Postmaster-General made the following order in respect of route No. 46211:

"1st. From March 1, 1881, increase service four (4) trips per week, and allow contractor \$2,796 per annum additional pay, being pro rata.

"2d. Reduce running time from thirty-four (34) hours to eighteen (18) hours, and allow contractor \$2,446.50 per annum additional pay, being fifty per centum of original cost of the service, but less than pro rata, as shown by sworn statement of carrier."

These orders were communicated to the contractor, and, pursuant thereto, the "increased" and "expedited" service has been duly performed.

August 4, 1881, the Sixth Auditor, in settling the accounts of the contractor for the quarter year ending June 30, 1881, allowed him, in respect of the "expedited" service on route 46210, an increase of fifty per cent. on the original contract price per trip, for six trips per week;

and on route 46211, an increase of fifty per cent. on the original contract price for only one trip per week.

August 4, 1881, Allman, being dissatisfied with the settlement made by the Sixth Auditor, appealed, under section 270 of the Revised Statutes, to the First Comptroller.

Nathaniel Wilson, for the contractor, made an able oral argument, and submitted a brief, as follows:

"The act of April 7, 1880, (21 Stats., 71,) means that the contract, as originally let, must be taken as establishing the rate of pay, and the rate of pay for expedited service cannot exceed fifty per cent. of the rate of pay fixed by the contract. The limitation of fifty per centum is of the rate of pay, and not of the aggregate of the payments to be made for expedited service. Thus, in reference to the service on route 46211, as by the original contract the service was to be performed once a week for \$699 per annum, the statute limits the compensation for expediting that service to fifty per cent. of that sum, and if seven expedited trips are required, instead of one, then the contractor is entitled to seven times what he is allowed for one expedited trip. If he receives fifty per centum of \$699, ($\$699 + \$349.50 = \$1,048.50$,) he will receive a rate of pay not exceeding fifty per centum upon the original contract."

The report of Hon. Thomas J. Brady, Second Assistant Postmaster-General, of November 1, 1879, contains this recommendation:

"Under section 3961, allowances for increased speed are based upon the sworn statements of contractors showing the additional stock and carriers required. This practically makes a man and a horse of equal value as factors in determining the rate of increased compensation to be allowed. I would therefore recommend that allowance for increased speed be based upon the proportion the *cost* of performing the original service bears to the cost of the service at the increased speed, and that such additional allowances shall in no case be greater than fifty per centum of the original cost of the service. In case the cost of increased speed would amount to more than fifty per centum of the cost of the original service, the Postmaster-General shall readvertise for service with the increased speed; or, in his discretion, he may advertise in any case where increased speed is necessary—the advertisement to be inserted for not less than thirty days in newspapers published at the termini of the route, or in those published elsewhere having circulation along the line of the route, the contract to be awarded to the lowest responsible bidder, as usual.

"This will accomplish, with but little delay, the desired improvement in the service, and with, I think, great advantage to the Government."

The section in the act of April 7, 1880, in question was reported by the Senate committee, and passed, on the statement that it was intended to carry out the recommendation of the Postmaster-General.

By section 3965 of the Revised Statutes the Postmaster-General may require an increase in the number of trips, in his discretion, and under section 3961 he may expedite the service on each trip. It would cost the contractor more to run one trip per week in eighteen hours than in thirty-four. If fifty per cent. of the cost of one trip per week, with thirty-four hours' running time, would be a proper additional compensation for expediting that trip to eighteen hours, it certainly would not

be a proper compensation for two, three, six, or seven trips per week. If the act of 1880 prohibits the Postmaster-General, in every case where a contract has been made for one trip per week, from paying for expedited service on any but that one trip, then the act has practically taken from him the power to authorize the performance of one trip per week under that contract. Policy required a construction which will not impair the powers of that officer.

Section 3961 has been uniformly construed as having reference to the *trips* specified and provided for in the contracts, and the term "compensation in the original contract" has always been understood to mean the sum of the cost of all the trips provided for under that contract, and which, by the terms of the contract, the contractor might be required to perform.

In presenting this appeal of the contractor, the attention of the Comptroller is called to the following provisions in the contractor's agreement with the Post-Office Department:

"It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may discontinue or extend this contract, change the schedule and the termini of the route, and alter, increase, decrease, or extend the same in accordance with law, he allowing a *pro rata* increase of compensation for any additional service thereby required, or for increased speed, if the employment of additional stock or carriers is rendered necessary; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay in the amount of service dispensed with, and a *pro rata* compensation for the service retained: *Provided, however*, That, in case of increased expedition, the contractor may, upon timely notice, relinquish the contract."

Under this clause the contractor had the right to decline to perform the expedited service required of him. If he had been informed that he could not have been paid for all the expedited service on route 46211 but \$349.50, he would undoubtedly have declined to perform it.

He did not decline, because he was promised by the Postmaster-General \$2,446 in payment for the service when performed.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The questions arising on this appeal relate to what is called the "Star-route service."*

*This service has been thus explained: The name "Star Route" has been adopted and is used by the Post-Office Department to designate all post-routes established by Congress other than railroad and steamboat routes.

Section 12, of the act of March 3, 1845, 5th Stat., page 733, provides for the letting of contracts for the transportation of the mails to the lowest bidder, without other reference to the modes of such transportation than may be necessary to provide for the due celerity, certainty, and security of such transportation.

Immediately after the passage of the above act, blank contracts were printed with three groups of four stars each, thus:

* * * * * * * * *

in the body of the contract, and are intended to signify the words "celerity," "certainty," and "security."

The word "star," as applied to post-routes, first appears officially in a report of the Postmaster-General, dated December 1, 1860, page 2, in which he states that the coach and inferior modes of service had been merged into one class, styled "star," or

The Revised Statutes provide as follows:

"SEC. 3960. Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the Department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order.

"SEC. 3961. No extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

"SEC. 3965. The Postmaster-General shall provide for carrying the mail on all post-roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper."

Section 2 of the act of April 7, 1880, (21 Stats., 71,) "to provide for a deficiency in the appropriations for the transportation of the mails on *star routes* for the fiscal year ending June thirtieth, eighteen hundred and eighty, and for other purposes," contains a clause as follows:

"*Provided*, That the Postmaster-General shall not hereafter have the power to expedite the service under any contract either now existing or hereafter given to a rate of pay exceeding fifty per centum upon the contract as originally let."

When an original contract is made for carrying the mail on any route for one trip a week, and the Postmaster-General subsequently requires two or more trips a week, the additional trips are called "*increased*" or "*additional*" service. When such contract requires a trip to be made on a route in, say, thirty-four hours, and it is modified by an order of the Postmaster-General requiring the trip to be made in eighteen or any less number of hours, the service rendered under the modified contract is called "*expedited*" service.

The question raised by the appeal applies to both contracts. It will, therefore, only be necessary to examine the action of the Sixth Auditor in relation to compensation for service on route No. 46211. The original contract provided that the mail should be carried once in each week in thirty-four hours, for \$699 per annum. The service was subsequently

with "celerity, certainty, and security." A like explanation is given of the use of the word "star" as applied to mail service, in a glossary of words, having a technical meaning in the postal service, appended to the Postal Laws and Regulations of 1879.

The term "star routes" is first used by Congress in an act approved July 12, 1876, making appropriation for the service of the Post-Office Department for the fiscal year ending June 30, 1877, and for other purposes, in which an amount is appropriated "for transportation on star routes, and by steamboats, and all other than railroad routes." (See 19 Stats., 78, 79.)

increased four trips, making in all five per week, and the time was expedited to eighteen hours per trip. The Sixth Auditor, in his settlement of the contractor's account for the quarter ending June 30, 1881, allowed compensation at the rate of \$699 per annum for each of the five trips per week; and he allowed for the expedited service only \$87.37, being at the rate of fifty per centum on the original contract price for one trip, and disallowed \$524.25, as being in excess of fifty per centum of the contract as originally let.* It will thus be seen that the order of the Postmaster-General of February 25, 1881, prescribed an increase of fifty per cent. on the contract price for each of the five expedited trips per week; but the Sixth Auditor only allowed the extra fifty per cent. on one of the five trips per week, thus holding, in effect, that the Postmaster-General exceeded his authority except as to one trip per week. Did he so exceed his authority in respect of the expedited service ordered on this route? This question involves a construction of the statutes above cited.

The act of April 7, 1880, (21 Stats., 71,) provides that "the Postmaster-General shall not hereafter have the power to expedite the service under any contract * * * to a rate of pay exceeding fifty per centum upon the contract *as originally let*." It is entirely clear from this language that the authorized increase of fifty per centum relates solely to the service and compensation specified in the original contract. The contract as "originally let" only authorized one trip per week, at an annual compensation of \$699. What was the "rate of pay" "upon the contract as originally let?" There can be but one answer, namely, \$699 per annum. This is the rate of pay which the statute declares shall not be increased "exceeding fifty per centum" by reason of expedited service. There is no ambiguity in the language of the statute. The Supreme Court holds that in such case "statutes must rest on the words used—nothing adding thereto, nothing diminishing." (*L. L. & G. R. Co. vs. United States*, 92 U. S., 751.) When the meaning of the language of the Revised Statutes is plain, "the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language." (*United States vs. Bowen*, 100 U. S., 513; *United States vs. Hirsch*, *Id.*, 35; *Waller vs. Harris*, 20 Wend., 562; *Sedgwick*, Stat. and Const. L.,

*Thus: The contract price for a year for one trip per week	\$699 00
One-fourth for three months	174 75
Fifty per cent. for expediting one trip	87 37

These two latter sums are allowed by the Sixth Auditor.

The amount allowed for expedited service by order of February 25, 1881, per annum, \$2,446.50, equal per quarter to \$611.62, and claimed by contractor, of which disallowed, \$524.25, and allowed, \$87.37.

195; *Johnson vs. Bush*, 3 Barb. Ch. 238; *Young vs. Dake*, 1 Selden, 463.) Vattel says: "The first general maxim of interpretation is, that it is not allowable to interpret what has no need of interpretation." The maxim, *Optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum*, applies in this case.

In construing a statute, four things are to be considered: (1) the prior law, (2) the mischief and defect for which it did not provide, (3) the remedy the later statute has provided, and (4) the true reason of the remedy. (Potter's Dwaris, Stats., 184; Heydon's case, 3 Coke, 7; 1 Kent, Com., 462; 10 Coke, 6; Plowd., 10, 57, 350, 363; *Boulton vs. Bull*, 2 H. Blackst., 499; Sedgwick, Stat. and Const. L., 198; 1 Blackst. Com., 87.) The prior law conferred large discretionary powers on the Postmaster-General in respect of making extra allowances for expedited service. This, as the act of April 7, 1880, shows, was deemed by Congress an evil. Under the prior law a skilful contractor might drive off competition by a bid to carry the mail for less than the service was worth. Having done this, he might, on an order for expedited service, obtain exorbitant compensation and profits. A door was open to favoritism and fraud, and Congress deemed it proper to establish a safe rule which should not lead into temptation. Although it should not be assumed that frauds or official indiscretions were committed, it must nevertheless be admitted that there was, prior to the passage of the act of April 7, 1880, an opportunity to make, upon *ex parte* and interested representations, enormous unnecessary expenditures without the direct sanction of Congress; hence the limitation imposed by the act of 1880 in respect of expediting star-route service. The "star-route" investigations in Congress, if it were proper to refer to them, would sufficiently show that this evil was the inspiring cause of the limitation put upon the powers of the Postmaster-General by that act. (Vol. 3, House Mis. Doc. 31, Parts 1 and 2, March 25, 1880, 46th Cong., 2d Sess.) The meaning of the statute is not, however, to be ascertained by reference to the report of the Postmaster-General, or the investigations or debates in Congress. (Sedgwick, Stat. and Const. L., 203; *Bank of Pa. vs. Com.*, 19 Pa. St., 144; *Southwark Bank vs. Com.*, 26 Pa. St., 446; *Leese vs. Clark*, 12 Cal., 387, 425; *Taylor vs. Taylor*, 10 Minn., 107.)

It has been urged by counsel for appellant, in respect of the powers of the Postmaster-General, that "policy required a construction which will not impair the powers of that officer." The answer to this is, that the powers of that officer are conferred by Congress; and, therefore, the question is not one of policy, but of legislative intent. Did Con-

gress by the act of 1880 limit the power granted in prior laws in respect of expediting star-route service? The purpose of the proviso was, plainly, to limit and reduce the powers previously exercised by the Postmaster-General under the Revised Statutes; it is, therefore, the duty of the proper accounting officers of the Treasury to construe it so as to meet the mischief intended to be guarded against and advance the remedy provided. (Potter's Dwarrior, 184; Hart *vs.* Cleis, 8 Johns., 44.) In Lyde *vs.* Barnard, it was said by Parke, B., that "when the act is intended to remedy some existing mischief, and such a construction is required to render the remedy effectual * * * we must always construe * * * so as to suppress the mischief and advance the remedy." (Lyde *vs.* Barnard, 1 M. & W., 113; Potter's Dwarrior, 73; Johns *vs.* Johns, 3 Dow, 15; Gillett *vs.* Moody, 3 N. Y., 479; People *vs.* Runkle, 9 Johns., 147.) "This is especially the case as to statutes which relate to matters of public utility." (Magdalen College case, 11 Coke, 71.) "Whenever the intention [of the statute] can be discovered it ought to be followed, with reason and discretion in its construction," (Tonnele *vs.* Hall, 4 Comst., 140;) and "this intention is sometimes to be collected from the cause or necessity of making the statute." (People *vs.* Utica Ins. Co., 15 Johns., 358, 380, 381; 1 Bl. Com., 61.) Sometimes the general state of public opinion at the time of the enactment may be considered in ascertaining legislative intention. (Sedgwick, Stat. and Const. L., 203; Keyport St. Co. *vs.* Farmers' Trans. Co., 3 C. E. Green, 13; Delaplane *vs.* Crenshaw, 15 Gratt., 457.)

To hold that there may be an increase of fifty per centum on every additional expedited trip, would be to leave without adequate remedy the evil intended to be remedied. The original contract was for one trip per week at an annual compensation of \$699, and seven expedited trips each week were ordered. An increase of fifty per centum on each, would make the annual compensation of the contractor \$7,339.50; thereby making an increase of 350 per centum in the rate of pay "upon the contract as originally let," instead of fifty per centum as provided in the statute. The act of April 7, 1880, must, upon the principles stated, be construed as limiting the authority of the Postmaster-General. He had not, to quote the language of the statute, authority to "expedite the service," in the case submitted, "to a rate of pay exceeding fifty per centum upon the contract as originally let." He might, according to his discretion, have ordered this rate of expedition to apply to one trip a week; or he might have ordered it to be distributed *pro rata* to each trip, but there was no authority to exceed that rate in gross.

When payments have been made by Government officers in excess of the amount lawfully authorized to be paid, a question may arise, as to whether, in a case like the present one, there is a remedy by set-off. The question is not now presented for decision; but it may, however, be proper to suggest that when the Government has in its custody money due to a claimant, there is, as a general rule, a right and a duty on the part of the proper accounting officers to apply it, or such part thereof as may be necessary, by way of set-off, as a credit on any equal amount due the United States from such claimant. (Rev. Stats., 236, 1059, 1061, 1766, 4734, 5073; 18 Stats., 481; *Gratiot vs. The United States*, 15 Pet., 370; *United States vs. Wilkins*, 6 Wheat., 144; *McKnight vs. United States*, 98 U. S., 186; 4 Op. Att.-Gen., 380; *Viser's case*, 1 Lawrence, Compt. Dec., 75.) A settled account is only *prima facie* evidence of its correctness at law or in equity; it may be impeached for fraud or mistake. (*Perkins vs. Hart*, 11 Wheat., 237; *Peterson vs. United States*, 2 Wash. C. C., 36.) An account already *settled* cannot be reopened by accounting officers in case of fraud, or mistake of law. Where an illegal credit or allowance has been made in an account, it is held that the judicial tribunal must be resorted to to construe the law and settle the rights between the United States and the party to whom the allowance was made or credit given. (*United States vs. Bank of the Metropolis*, 15 Pet., 401; *Murray's Lessee vs. Hoboken Land and Improvement Company*, 18 How., 275, 277, 278, 281; 2 Op. Att.-Gen., 515; 3 Op., 461; 12 Op., 386; 13 Op., 297.) With respect to a mail contractor's account, it might be urged with some force that it is not *settled* in a legal sense until his contract is *fully* performed; and that quarterly adjustments are mere *rests* in the account.

In *Clark vs. United States*, (1 Ct. Cls., 251; s. c., 6 Wall., 453,) Loring, J., delivering the opinion of the court, said, in respect of payments made on public contracts, that "this is usual in the contracts of the United States, and is for the convenience of the contractors, and the provisions for it [in the contract] are to be construed in reference to that [usual practice] only," and that such payments are "made subject to a final settlement, and not as payments (each) of so much work done." The facts that such payments are authorized by section 3648 of the Revised Statutes, that the post-office accounts are settled quarterly, (Rev. Stats., 3843-3845, 4049, 4050,) that there is an appeal to the First Comptroller within twelve months only from such settlements, that the Comptroller's decision on the appeal is made conclusive, that section 4057 of the Revised Statutes contains directions for the institution of legal proceedings in the courts in respect of items improperly allowed in or paid on postal accounts, that contracts for carrying the mails

are usually let for four years, and that section 4060 of the Revised Statutes provides for preserving for two years only accounts-current in respect of mails sent or received, would raise a strong implication against the propriety or legality of applying to mail contractors' accounts the doctrine laid down by the Court of Claims. It may, however, apply to accounts not settled by the Sixth Auditor. But Attorney-General Wirt held, in a very strong opinion, that "*in every instance* the decision of the Comptroller is * * * *final*," and that "it is manifest that the law contemplates no farther examination, by any officer, after such decision." (1 Op., 627.) The provision of section 191 of the Revised Statutes would seem to be conclusive against the right on the part of any executive officer to review any account of which the balance was certified and paid. (10 Op., 231, 235.)

The settlement made by the Sixth Auditor is affirmed, and the appeal is dismissed.

TREASURY DEPARTMENT,

First Comptroller's Office, August 12, 1881:

IN THE MATTER OF THE AUTHORITY OF THE SECOND COMPTROLLER TO DIRECT, IN HIS CERTIFICATE OF THE BALANCE DUE ON QUARTERMASTER'S VOUCHER, THAT PAYMENT BE MADE TO ASSIGNEE OF THE VOUCHER.—BENTON'S CASE.

1. A voucher given by a quartermaster for supplies purchased for the Army is, in effect, a claim against the United States, and therefore it is not assignable. The assignee of such a voucher cannot acquire any interest therein or right to the payment due thereon.
2. When Congress makes an appropriation requiring, in effect, payment to be made to a person named, no payment can be made to the assignee of such person, except as provided in section 3477 of the Revised Statutes.
3. Although an assignee of a claim against the United States may have an equitable right, the executive department of the Government cannot adjudicate it. It is very doubtful whether the assignee has a remedy in the courts. Executive officers, in adjusting accounts, cannot, as a general rule, look into latent equities; payments must be made to the parties having the legal right thereto.
4. The Second Comptroller is not authorized to countersign any warrant drawn on the Treasurer for the payment of any claim. The First Comptroller is required by law to countersign only such warrants as shall be "warranted by law."
5. No Treasury warrant can be paid unless it is countersigned by the First Comptroller. When a warrant has been countersigned, it cannot be changed without the First Comptroller's consent. He is thus clothed with complete jurisdiction to refuse assent to any proposed change in a countersigned warrant.

6. When the Second Comptroller amends his certificate of a balance by him found due to a claimant, so as to make it payable to an assignee, the First Comptroller has authority to review the amendment. He is clothed with complete jurisdiction to refuse or assent to any change in a warrant issued to pay a balance certified by the Second Comptroller. This reviewing authority is sufficiently shown in Bender's case, 1 Lawrence, Compt. Dec., 317.

May 12, 1879, George E. Lemon, as attorney, filed with the Third Auditor quartermaster's vouchers in favor of Landon D. Craig against the United States, for 30,942 pounds of hay, sold July 11, 1862, at \$6.50 per ton; in all, \$100.56. An account was stated by the Third Auditor for the payment of this voucher, and the balance found due was, March 22, 1880, certified for payment by the Second Comptroller.

This balance, with others, having been reported in December, 1880, to the Speaker of the House of Representatives, pursuant to section 4 of the act of June 14, 1878, (20 Stats., 130,) an appropriation was made in the deficiency appropriation act of March 3, 1881, (21 Stats., 414, 427, 431,) as follows:

* * * * *

SEC. 2. For the payment of claims certified to be due by the several accounting officers of the Treasury Department under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of section five of the act of June twentieth, eighteen hundred and seventy-four, and under appropriations heretofore treated as permanent, being for the service of the fiscal year eighteen hundred and seventy-nine and prior years, and which have been certified to Congress under section four of the act of June fourteenth, eighteen hundred and seventy-eight, as fully set forth in House Executive Document Number Thirty, Forty-sixth Congress, third session, and for other items, as follows:

* * * * *

WAR DEPARTMENT.

* * * * *

For regular supplies for the Quartermaster's Department, eighteen hundred and seventy-eight, and prior years, as particularly itemized on pages eighty-nine and ninety of the same document, eight thousand eight hundred and fifty-nine dollars and fifty-two cents.

The executive document referred to specifies Landon D. Craig as a claimant in the list of claims allowed by the Third Auditor and Second Comptroller, under section 4, act of June 14, 1878.

March 26, 1881, Treasury draft No. F, 12325, payable to the order of Landon D. Craig, on war warrant No. 1161, was duly issued by the Treasurer of the United States for \$100.56.

May 6, 1881, affidavits were filed in the office of the Second Comptroller showing that W. A. Benton had, long prior to 1868, purchased

the claim, and that the quartermaster's voucher had been delivered to him by Craig.

May 16, 1881, the Third Auditor and Second Comptroller made an indorsement on the report of the Auditor and the certificate of the Second Comptroller of balance due, recommending "that payment of the amount mentioned within (\$100.56) be made to W. A. Benton, holder and owner." The Treasury draft, which, as stated, was payable to Craig, was returned to the Secretary of the Treasury by Benton's attorney, to whom it had been delivered.

May 16, 1881, the Acting Third Auditor addressed a letter to the Secretary of the Treasury, stating that he had amended the certificate so as to provide for payment to Benton, and requesting that upon receipt of the amended requisition of the Secretary of War the Secretary of the Treasury would cause the warrant to be changed so as to conform thereto, and that when so amended it may be forwarded to the Treasurer of the United States for his guidance. This letter was on same date referred to the First Comptroller.

August 6, 1881, George E. Lemon, as attorney for Benton, addressed a letter to the Secretary of the Treasury, "referring to war requisition 388, of March 17, 1881, in favor of Landon D. Craig," and requesting "that the warrant of the Hon. Secretary of the Treasury be so modified as to admit the payment of the amount appropriated to W. A. Benton—the Hon. Third Auditor and Hon. Second Comptroller having changed the settlement certificate, and the Hon. Secretary of War having modified his requisition accordingly."

August 13, 1881, this letter was referred by the Secretary to the First Comptroller.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The warrant authorizing payment to Craig cannot, for several reasons, be changed so as to authorize payment to Benton :

1. The voucher originally given to Craig was in effect a claim against the United States, and therefore it was not assignable. Benton could not by its purchase acquire any interest therein, or right to payment. (Rev. Stats., 3477; Dana's case, *ante*, 203; Safford's case, 1 Lawrence, Compt. Dec., 262; United States *vs.* Gillis, 95 U. S., 407; Erwin *vs.* United States, 97 U. S., 392; Spofford *vs.* Kirk, 97 U. S., 484; McKnight *vs.* United States, 98 U. S., 179; Goodman *vs.* Niblack, 102 U. S., 556; Cowdrey *vs.* Vandenburg, 101 U. S., 572.)

2. The act of March 3, 1881, (21 Stats., 427, 431,) having made an appropriation requiring in effect payment to be made to Landon D.

Craig, no payment can be made on the assignment to Benton. This act appropriates money "for the payment of claims certified to be due * * * for regular supplies for the Quartermaster's Department, * * * as particularly itemized * * * in House Executive Document" No. 30, 46th Congress, 3d session. On page 89 this claim is itemized as "No. of settlement claim 7427—Landon D. Craig—Regular supplies Quartermaster's Department, 1878, and prior years. (Revised Statutes, section 1133.) Fiscal year in which the expenditure occurred, 1863; amount, \$100.56." This identifies the claim and the party entitled to payment. It would, in the present state of the case, be a clear violation of section 3477 of the Revised Statutes, and of the implied direction of the appropriation act, to make payment to any person other than Craig.

3. Although Benton may have an equitable right to the money arising on this claim, the executive department of the Government cannot adjudicate it. It is very doubtful whether he has a remedy in the courts in respect of the assignment. It has been repeatedly held that executive officers, in adjusting accounts, cannot, as a general rule, look into latent equities; payments must be made to the parties having the legal right thereto.

4. The First Comptroller is authorized to review the action of the Second Comptroller in amending the certified balance found due to Craig, so as to make it payable to Benton. This reviewing authority is sufficiently shown in Bender's case, 1 Lawrence, Compt. Dec., 317, 391. The Second Comptroller is not authorized to countersign any warrant drawn by the Secretary of the Treasury on the Treasurer for the payment of any claim. He has no control over it. The First Comptroller is required by law to countersign only such warrants as shall be "warranted by law." (Rev. Stats., 269.) A warrant issued for the payment of the assignee of a claim in a case where, to quote the language of the statute, the assignment was "absolutely null and void," would certainly not be "warranted by law." No warrant can be paid unless thus countersigned by the First Comptroller. When a warrant has been countersigned by the First Comptroller, it cannot be changed without his consent. He is thus clothed with complete jurisdiction to refuse his assent to the proposed change.

The warrant for payment cannot be changed, and the Secretary of the Treasury will be so advised.

TREASURY DEPARTMENT,

First Comptroller's Office, August 15, 1881.

IN THE MATTER OF THE RUNNING OF INTEREST ON JUDGMENT FOR THE UNITED STATES WHILE MONEYS DUE THE JUDGMENT-DEBTOR, SUFFICIENT TO SATISFY THE JUDGMENT, ARE HELD FOR SET-OFF IN THE TREASURY.—ELGEE'S CASE.

1. The act of Congress of March 3, 1875, (18 Stats., 481,) did not originate the right of the accounting officers of the Treasury to make set-off; it only regulated an existing right and imposed new duties in certain cases.
2. The statute gives the Government the right within ninety days to appeal from a judgment rendered against it in the Court of Claims, and therefore, in contemplation of law, such judgment is not payable out of the Treasury before the expiration of that time, unless the Attorney-General satisfies the Treasury Department that an appeal is not contemplated.
3. When the United States recovers a judgment in a circuit court or other inferior tribunal, and the defendant sues out a writ of error in the Supreme Court, the Secretary of the Treasury has no authority under the act of March 3, 1875, to satisfy such judgment, either in whole or in part, from moneys in the Treasury due the defendant, until there is a final judgment in or pursuant to the order of the Supreme Court.
4. In such case if the judgment of the circuit court bears interest, and there is no statutory provision allowing interest on the money in the Treasury due the defendant, interest on the judgment in favor of the Government will run until it is satisfied by payment or set-off. If by set-off, interest will run only to such time as a set-off might lawfully be made.
5. The fact that the Government holds money to be applied at the end of a litigation cannot, in law or morals, charge it with interest on the money so held. The Government cannot use the money; it must keep it subject to the result of the litigation, which may terminate any day.
6. A judgment in favor of the United States must, by statutory provision, bear interest until money is applied in satisfaction thereof; and it can be so applied only by agreement, or by an actual application, or by force of a law so applying it.
7. There is no rule of law or equity which allows interest on money due, unless it be required to be paid (1) by statute or (2) by the terms of a contract. Interest laws impose no liability on the Government unless they expressly so provide.
8. "Natural equity says that cross-demands should compensate each other by deducting the less sum from the greater, and that the difference is the only sum which can be due."
9. Section 3624 of the Revised Statutes provides that "whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account * * * an interest of six per centum per annum from the time of receiving the money until it shall be repaid into the Treasury."

10. This provision is taken from section 1 of the act of March 3, 1797. In the original law the word "First" was omitted, because there was then no other Comptroller, the office of Second Comptroller not having been created until March 3, 1817.
11. It is questionable whether any accounting officer other than the First Comptroller has power to act under the provision of section 3624; and this may explain the omission of interest from the "time of receiving the money" from judgments rendered in some cases against defaulting officers of the Government.
12. It has not been the practice of late to charge the interest prescribed in section 3624, either in stating an account for suit against a delinquent officer for the recovery of a balance due the United States, or in making a final settlement without suit after a neglect or refusal to pay such balance.
13. But, notwithstanding the creation of the office of Second Comptroller, section 10 of the act of March 3, 1817, expressly enacts "that it shall be the duty of the First Comptroller to superintend the recovery of *all debts to the United States*; to direct suits and legal proceedings, and to take all such measures as may be authorized by the laws, to enforce prompt payment of *all debts to the United States*."
14. When the office of Commissioner of Customs was created by section 12 of the act of March 3, 1849, the accounting powers of the First Comptroller "relating to the receipts from customs and the accounts of collectors and other officers of the customs, or connected therewith," were devolved on the Commissioner.
15. The duty of ascertaining the amount of interest due up to the date of settlement of an account certified by the First Comptroller and put in suit, is incumbent on the First Comptroller and not on the court.
16. The act of March 3, 1875, expressly authorizes the Secretary of the Treasury to withhold moneys due from the United States to a surety on an official bond, in order to satisfy therefrom a claim of the United States not yet adjudged as due from the surety. The Secretary could not, perhaps, have done this before that act was passed.

January 15, 1881, the Acting Secretary of the Treasury addressed a letter to the First Comptroller, as follows:

SIR: I transmit herewith for your action a duly certified copy of the judgment in case *United States vs. Mrs. B. E. Gaussen, executrix, et al.*, and a like copy of the mandate of the Supreme Court affirming said judgment.

The history of the case is substantially as follows:

In the year 1845, or subsequent thereto, a suit was commenced by the United States, as for default, on the bond given by Thomas Barrett, as collector of customs at the port of New Orleans, against the principal and his surety, one John K. Elgee, which suit was for many years pending in the U. S. court in Louisiana and in the Supreme Court, and was finally concluded (the principal defendants being dead) in a judgment against Bessie E. Gaussen, executrix of the will of said Elgee, and E. T. Parker, public administrator of his estate, for the sum of thirty-six thousand eight hundred and fifteen dollars and eighty-six cents, with interest on said sum from the 12th day of October, 1845, at the rate of six per centum per annum, until paid, as damages, and all of the costs of the suit to be taxed. Judgment was rendered May 1, 1875. This judgment was affirmed by the Supreme

Court, to which the cause had been taken by writ of error, at the October term, 1878.

In a suit in the Court of Claims, Edward Thomas Parker, dative testamentary executor of John K. Elgee, deceased, *vs.* The United States, judgment was rendered in favor of claimant May 17, 1875, in compliance with a mandate of the Supreme Court, for \$366,170.83, as the net proceeds in the Treasury of certain cotton. This judgment was payable, without interest, from the proceeds of captured and abandoned property. The transcript of the judgment of the Court of Claims was transmitted to the Department by claimant's attorneys and was received July 2, 1875. After some delay, caused by allegations that evidence could be obtained which would sustain a motion for a new trial in the cause, on the 10th of September, 1875, part of the judgment, to wit, the sum of \$261,163.24, was paid to said claimant, and the remainder, amounting to \$105,007.59, was withheld under the provisions of the act of Congress approved March 3, 1875, chap. 149, to await final judgment of the courts in the cause above referred to, *United States vs. Mrs. B. E. Gaussen, executrix, et al.*

The amount thus retained was the estimated amount of the judgment in said cause with interest, computed to September 1, 1875, and the costs of court, and also included the sum of \$2,056.66, as the amount of the commissions, at two per cent. on said judgment, of the district attorney at New Orleans, claimed by him under section 825, Revised Statutes.

The claim of Mr. Beckwith for commissions was refused by this Department, and he brought suit therefor in the Court of Claims.

In the settlement to be made in the office of the Commissioner of Customs of the accounts of Thomas Barrett, the question arises, *to what date, from October 12, 1845, shall interest be computed on the judgment against Mrs. B. E. Gaussen, executrix, et al.*

The certified copy of the mandate of the Supreme Court sets forth the judgment of the court below, as follows:

Circuit Court of the United States, Fifth Circuit and District of Louisiana.

THE UNITED STATES

vs.

MRS. B. E. GAUSSEN, EXECUTRIX, ET AL.

} No. 5922.

Mandate.—Entered and filed January 17, 1879.



UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America, to the honorable the judges of the circuit court of the United States for the district of Louisiana, greeting:

Whereas lately in the circuit court of the United States for the district of Louisiana, before you, or some of you, in a cause between The United States, plaintiff, and Mrs. Bessie Elgee Gaussen, wife of Edmond J. Gaussen, executrix of the last will and testament of her father, John Kingsbury Elgee, deceased, E. T. Parker, public administrator, substituted defendant, wherein the judgment of the said circuit court entered in said causes is in the following words, viz:

“It is by the court ordered, adjudged, and declared that the said plaintiff, The United States of America, do have and recover of and

against the said succession of the said John Kingsbury Elgee and of the said Mrs. Bessie E. Gaussen, as executrix of the last will and testament of the said John Kingsbury Elgee, as well as of and against the said E. T. Parker, in his said capacity of public administrator, representing the said succession as aforesaid, the full sum of thirty-six thousand eight hundred and fifteen dollars and eighty-six cents, with interest on said sum from the 12th day of October, A. D. eighteen hundred and forty-five, at the rate of six per centum per annum until the same shall be paid, as damages, besides all the costs of this suit to be taxed.

"It is further ordered that this judgment be paid in the course of administration of the aforesaid estate, or that the plaintiff have execution therefor against the property belonging to the said succession of the said John Kingsbury Elgee, deceased."

Judgment rendered May 1, 1875; judgment signed May 6, 1875: as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and seventy-eight, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel: On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

28TH OCTOBER, 1878.

You therefore are hereby commanded that such proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding. Witness, &c.

Carlisle & McPherson for the dative executor of Elgee:

The question arises, up to what date is the interest to be computed on the judgment in favor of the United States—whether up to the date when the judgment in favor of the claimant became payable, viz., May 17, 1875, or up to the present date, when the residue of the claimant's judgment is to be paid.

We think it obvious that the former is the date. The judgment of the Court of Claims, being entered in pursuance of a mandate of the Supreme Court, was payable instantly, and since that time the money has been detained to meet the judgment of the circuit court. There has never been any question on this head. It would be in the highest degree inequitable that the claimant should be charged interest on a sum actually in the Treasury, and held by the Treasury in satisfaction of his debt.

The interest on the judgment of the circuit court of May 6, 1875, must not be computed beyond the 17th of May, 1875.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

The United States is by the terms of the judgment rendered against Bessie E. Gaussen, executrix, and E. T. Parker, public administrator, entitled to interest on the principal sum sued for and recovered against

them as representatives of the late John Kingsbury Elgee, surety on Barrett's official bond. The principal sum recovered was \$36,815.86, and by the terms of the judgment interest thereon at six per centum per annum was allowed from October 12, 1845, to May 1, 1875, the day on which the judgment was rendered, and from the latter date until the date of satisfaction of the judgment. Giving to this judgment the most favorable construction which could be claimed for it by the debtors, interest must be held to run thereon until the date when the judgment might have been satisfied by the exercise of due diligence on the part of the Government.

The question therefore is, when was this judgment satisfied, or when could the Government, by the exercise of due diligence, have obtained satisfaction thereof? The judgment was signed May 6, 1875. Ten days thereafter, or from the close of the term, the United States had a right to process of execution, (*Labarre vs. Durnford*, 10 Martin, La., 182,) unless there was a stay of such process under the provisions of section 1007 of the Revised Statutes. It does not appear by the papers referred whether a *fierifacias* was or was not issued, or whether the writ of error operated as a supersedeas. It is a presumption of law that the district attorney and the marshal, respectively, performed their duty. The papers in the case show that up to September 10, 1875, no part of the judgment, except a small amount of costs, was satisfied. In the absence of evidence to the contrary, it is, therefore, to be presumed that process of execution was duly issued and returned *nulla bona*. In such event, or, in fact, without the issue of process of execution, interest would run until the principal amount of the judgment recovered were satisfied. In the case under consideration a writ of error was issued to the circuit court; whether or not the security required by law on the issuing of the citation (Rev. Stats., 999, 1000, 1007) was given does not affect the question of interest. Section 1010 provides that "where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondent[s] in error just damages for his delay, and single or double costs, at its discretion."

The judgment of the circuit court was affirmed by the Supreme Court October 28, 1878. That judgment awarded interest on the principal amount recovered at six per centum per annum, "until the same shall be paid," as damages in the suit. This was considered by the Supreme Court as just damages for any past or future delay in satisfying the demand of the United States. The jury did not compute the amount of interest due at the time of bringing in the verdict, and it was not aggregated with the principal and included in a judgment for one gross

sum, as is customary in most of the States; but as they found the time from which interest commenced to run, there can be no difficulty on this point. *Id certum est quod certum reddi potest.* It is a mere matter for computation; the judgment is complete in all its parts.

The Government is not responsible for the neglect or default of its officers, and, if it were, still the case, as presented, does not disclose any laches on the part of the officers of the circuit court or on the part of the Secretary of the Treasury in respect of the matter of obtaining satisfaction of the judgment. The question must, therefore, be decided under the provisions of the act of March 3, 1875, (18 Stats., 481, chap. 149,) and the principles of law applicable in such case. This act provides—

“That when any final judgment recovered against the United States or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-off, and discharges his judgment or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff, or claimant, denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment, or claim, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Secretary with six per cent. interest thereon for the time it has been withheld from the plaintiff.”

It may be remarked here that this act did not originate the right of accounting officers to make set-off; it only regulated an existing right and imposed new duties in certain cases. (Rev. Stats., 191, 236, 277, 286, 1059, 1061, 1766, 4734, 5073; Viser's case, 1 Lawrence, Compt. Dec., 75; United States *vs.* Wilkins, 6 Wheaton, 144; Reeside *vs.* Walker, 11 How., 290; McKnight *vs.* United States, 98 U. S., 186; United States *vs.* Lyman, 1 Mason, C. C., 482; 3 Op. Att.-Gen., 152, 163; 4 Op. Att.-Gen., 33, 380; United States *vs.* Robeson, 9 Pet., 324; Gratiot *vs.* United States, 15 Pet., 370; DeGroot *vs.* United States, 5 Wall., 431; United States *vs.* Eckford, 6 Wall., 484; Tillou's case, 7 Ct. Cls., 18; Bonnafon's case, 14 Ct. Cls., 484.)

Final judgment against the United States in the Elgee Cotton case was, pursuant to mandate of the Supreme Court, signed in the Court of Claims May 17, 1875. Section 708 of the Revised Statutes provides for appeals from such judgments: "All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered * * *." On the 17th of May, 1875, the Government filed a motion for a new trial, and this motion was overruled on May 31, 1875. It does not appear that the Government appealed the case to the Supreme Court. The statute gave the Government ninety days from May 17, 1875, in which to appeal, (Rev. Stats., 708,) and therefore, in contemplation of law, the judgment was not payable out of the Treasury before the expiration of that time, unless the Attorney-General satisfied the Treasury Department that an appeal was not contemplated. There is no evidence that the Attorney-General so satisfied the Department.

Section 1089 of the Revised Statutes provides that "in all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court." Section 1090 provides that "in cases where the judgment appealed from is in favor of the claimant, and the same is affirmed by the Supreme Court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid * * *."

Section 1089 must be construed with section 708. The evident intention of section 1090 is, that where the appeal shall be taken by the Government, and the judgment of the Court of Claims is affirmed, interest shall be allowed from the date of the presentation to the Secretary of the Treasury of the copy of the judgment from which the appeal was taken. The right to interest depends, therefore, upon an appeal taken by the United States. No such appeal having been taken in the present case, the provisions of this section have no legal application to the question submitted. The transcript of the judgment was presented at the Treasury Department July 2, 1875, forty-five days before the expiration of the ninety days allowed for appeal; and payment was not made thereon until September 10, 1875, twenty-six days after the expiration of the ninety days. No complaint is made respecting this delay. It was a reasonable delay, under the circumstances of

the case; and, like other cases of withholding payment of a claim after it has been allowed by competent authority until the proper officers of the Treasury are satisfied that it should be paid, the law does not authorize interest to run on the amount found or adjudged to be due and payable.

On the 15th day of August, 1875, the day on which the judgment of the Court of Claims would, under ordinary circumstances, have been payable at the Treasury, the United States had a demand against the claimant for \$36,815.86, with interest thereon at the rate of six per cent. per annum from October 12, 1845. The claimant did not then consent to have this demand set off against the judgment rendered in the Court of Claims. On the contrary, he prosecuted a suit from the judgment on writ of error in the Supreme Court, and continued to prosecute it until the October (1878) term of said court. In this condition of the case, the Secretary did, without unnecessary delay, exactly what the statute required: he withheld \$105,007.59 as a fund from which to satisfy the debt due the United States, together with interest and costs in the suit then pending in the courts. He had no power, authority, or right, either at law or in equity, to satisfy any part of the judgment obtained in the circuit court at this stage of the proceedings, for the reason that the suit might finally be decided in favor of the defendants. The Secretary could not assume that it would not be so decided. Hence he could not, until the affirmance of the judgment in favor of the United States, make a set-off in satisfaction of that judgment; and until it was satisfied, or could have been so satisfied, interest ran thereon. To hold otherwise would be to hold contrary to the express terms of the judgment of the court. The earliest moment at which the Secretary could have satisfied this judgment was clearly the day on which it was affirmed by the Supreme Court at the October term, 1878—namely, October 28, 1878. It was not until this date, to quote the language of the court, that such proceedings could be had in the said cause “as, according to right and justice and the laws of the United States, ought to be had.” It would not have been according to right or justice or the laws of the United States to have set off any part of the judgment of the Court of Claims as a satisfaction of the judgment in the suit against the claimants until the Supreme Court had rendered its judgment. No right to set-off, in respect of this judgment, existed before that date on the part of the United States, and therefore it was not attempted to be set off. Clearly, the judgment was not satisfied on the 28th day of October, 1878; hence interest thereon must be computed up to October 28, 1878.

The argument that the United States had the money in the Treasury from which the debt due the United States was to be satisfied has no force. The case is not like one where a defendant pays money into court; but it is, in some respects, like a case of set-off in a suit in court. In the former case no interest would run after payment into court; in the latter, interest on each of the adverse claims would run until the court rendered its final decision. If one of the adverse claims bore interest and the other did not, interest would run on the claim bearing interest until such decision was rendered, because interest, where payable, is demanded in a suit as fully as the principal debt is demanded. The indebtedness of a plaintiff to a defendant does not stop the interest due on the defendant's debt to plaintiff. If A sues B on the latter's note for \$100 with interest at six per cent., and A owes B \$100 without interest, and B plead A's debt to him in offset, A will recover interest from the date of the note, and obtain judgment therefor; and interest will run on such judgment until it is satisfied. In the present case, the collector of customs and his personal representative had the use of \$36,815.86, moneys of the United States, for more than thirty years. The law gave the United States a right to interest at six per cent. thereon until it was paid or a judgment therefor was, or could be, satisfied. On the other hand, the United States had the use of a much larger sum of money belonging to these parties for about eighteen years, but on this money no interest was allowed by law. It is clear, therefore, that, like a case of offset in court, interest must have run on the debt due the United States until it was decided that the United States owed a like sum to the defendant; and, as shown, this fact was not decided, so as to allow the Secretary of the Treasury to make the offset, until October 28, 1878. The fact that the Government held money to be applied at the end of the litigation could not, in law or morals, charge it with interest on the money so held. The Government could not use it; it must keep it subject to the result of a litigation which might terminate any day. A judgment in favor of the United States must, by statutory provision, (Rev. Stats., 3624,) bear interest until money is applied in satisfaction thereof; and it can only be so applied by agreement, or by an actual application, or by force of a law so applying it. No such satisfaction is claimed to have been made.

Natural equity might, possibly, seem to require the observance of many considerations which legal equity cannot entertain. If this were a case between private parties on a contract, pursuant to which interest ran only on the less amount, natural equity might seem to require a waiver of such interest from the time when the larger sum was decided

to be due; but the equity of the courts follows the law, and does not relieve from positive legal liabilities. There is no rule of law or equity which allows interest on money due, unless it be required to be paid (1) by statute or (2) by the terms of a contract. Interest laws impose no liability on the Government unless they expressly so provide. (*Lincoln vs. Clafin*, 7 Wall., 139; *Gordon vs. United States*, *Id.*, 193; *United States vs. Sherman*, 98 U. S., 567.)

There is, in the matter of the judgment in favor of the claimants in the Court of Claims, no statute authorizing interest, and there is no contract to pay interest; but in the matter of the judgment of the circuit court, the United States, pursuant to law, recovered judgment, not only for the principal debt, but also for interest and costs.

The true equitable principle of set-off is well stated by Lord Mansfield in *Green vs. Farmer*, as reported in 4 Burrows, 2220: "The general question is, whether the plaintiffs in this action should be obliged to do justice to the defendants by paying them what is due to them before they are entitled to demand the goods [or satisfaction of their debt] from them. * * * Natural equity says that cross-demands should compensate each other by deducting the less sum from the greater, and that the difference is the only sum which can be due." (S. C., 1 W. Black., 652; see *Selleck vs. French*, 1 Conn., 32; s. c., 1 American Leading Cases, Hare & Wallace's notes, 507 *et seq.*)

Up to the date of final judgment on the writ of error to the circuit court, the United States and the defendants each pursued, by separate actions at law, the remedies for their respective claims. Granting, for sake of argument, that the demand for the cotton seized could have been pleaded in offset of the demand on the collector's bond, and, on the other hand, that the United States might have pleaded the demand on the bond against the cotton claim, each of the parties waived the plea of set-off. It was not until the end of all litigation between them, in respect of these suits, that the set-off provided for by the act of March 3, 1875, could, without the consent of the cotton claimants, have been applied by the Government. Hence, until that time, each party must be regarded as suing in separate actions for their respective claims. Holding in view that no interest ran or could be allowed against the United States, what is the equity of the case? The United States owed the estate of Elgee \$366,170.83, without interest, and the estate of Elgee owed the United States \$36,815.86, with interest thereon at six per centum per annum from October 12, 1845, (the date of the demand by suit,) as damages, together with the costs. The law contemplated full satisfaction of each judgment. The private creditors might waive any part

of their demand or judgment, but the United States does not confer authority on any of its officers to waive any of its judgment rights. Equity does not conflict with positive law. In one case the law allows interest; in the other it forbids interest to be allowed on the amount withheld, unless it be adjudged that the moneys withheld were not due. Set-off is founded on an equitable principle. The rule is that he who seeks the aid of equity must be willing to do equity. Whenever a complainant does not comply with this rule by averring in his bill his readiness or willingness to pay principal and interest, he can have no standing in a court of equity. (Stanley *vs.* Gadsby, 10 Pet., 522.) The law (Rev. Stats., 236) confers on the accounting officers of the Treasury, in respect of all claims and demands whatever by the United States or against them, the powers of a court of equity in the matter of set-off. They are authorized to settle and adjust such demands, and to certify the balances for payment. (Rev. Stats., 269, 273, 277, 317.) What in equity the debtor of the United States should do, the law authorizes the proper accounting officers of the Treasury to do for him. The act of March 3, 1875, conferred no new powers on the Treasury Department, except, perhaps, with respect to sureties on official bonds; rather, it restrained their powers, and provided a remedy in behalf of the debtor, compelling the institution of a suit by the Government, if the matter is not already in suit, when the justice of the demand of the United States is denied.

It appears that the balance sued for on the collector's bond was certified August 7, 1845, (United States *vs.* Gaussen, 19 Wall., 201,) and that interest was allowed only from October 12, 1845, probably the date of the demand by suit for its payment. Section 3624 of the Revised Statutes provides that "whenever any person accountable for public money, neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account, the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of six per centum per annum from the time of receiving the money until it shall be repaid into the Treasury." This provision is taken from section 1 of the act of March 3, 1797. (1 Stats., 512.) In the original law the word "First" was omitted, because there was no other Comptroller, the office of Second Comptroller not having been created until March 3, 1817. (3 Stats., 366, sec. 3.) But, notwithstanding the creation of this office, section 10 of the latter act expressly says "that it shall be the duty of the First

Comptroller to superintend the recovery of *all debts to the United States*; to direct suits and legal proceedings, and to take all such measures as may be authorized by the laws, to enforce prompt payment of all debts to the United States." When the office of Commissioner of Customs was created by section 12, act of March 3, 1849, (9 Stats., 396,) the accounting powers of the First Comptroller "relating to the receipts from customs and the accounts of collectors and other officers of the customs, or connected therewith," were devolved on the Commissioner.

It has not been the practice to charge the interest prescribed in the act of 1797 (Rev. Stats., 3624) either in the case of stating an account for suit against a delinquent officer for the recovery of a balance due the United States or in making a final settlement without suit after a neglect or refusal to pay such balance. It is questionable whether any accounting officer other than the First Comptroller has power to act under the provision of section 3624; and this may explain the omission from the judgment in the present case of interest from the "time of receiving the money." Under the practice of the Treasury Department, instructions to institute the suit were, in this case, given by the Commissioner of Customs. The duty of ascertaining the amount of interest due up to the date of settlement of the account put in suit was incumbent on the accounting office—First Comptroller's—and not on the court. The matter of the omitted interest might, in strict right, be regarded as an existing claim against the representatives of the surety, since no demand was made in the suit for interest accrued before the filing of the declaration. But as it would at this late day be difficult, perhaps impossible, to ascertain the time of receiving the money represented by the balance for which judgment was rendered, the matter is alluded to in order to show that Congress expressly provided that interest shall run on all debts due the United States on account of public money, and that the neglect or refusal to pay the same relates back from the time of receiving the money, and continues until it shall be repaid into the Treasury. In this case there never was on the part of the debtors a repayment into the Treasury. The act of March 3, 1875, expressly authorized the Secretary of the Treasury to withhold moneys due from the United States to a surety on an official bond, in order to satisfy therefrom a claim of the United States not yet adjudged as due from the surety. The Secretary could not, perhaps, have done this before that act was passed. The law enabled him to place a lien on the money pending the suit on the bond. If the judgment rendered in such suit had been for the surety, then the lien would have been discharged, and the statute would have given a right

to interest on the moneys withheld. As the judgment was for the United States, the lien was not discharged. This judgment was rendered October 28, 1878; then, and not before, the Secretary of the Treasury might have applied the money held by him to the satisfaction of that judgment.

Although it is not necessary now to decide whether a debtor to the United States who fails to make payment is, after demand made, liable to pay interest, if payment be thereafter made without suit, the question, if it were pertinent, would be worthy of consideration, for there are many accounts in which debtors after long delay make payment without suit.

The Government has paid the commissions of the district attorney on the judgment rendered in his favor, but this cannot affect any question in the matter submitted.

It is considered in the present case that the interest on the judgment of \$36,815.86 in favor of the United States should be computed at six per centum from and including October 12, 1845, when suit was commenced, up to, but excluding, the 28th of October, 1878, the date on which the judgment of the circuit court was affirmed by the Supreme Court. The accounting officers could have adjusted the accounts by allowing the set-off as if made on the latter date. Against the aggregate of principal and interest thus produced on said judgment should be set off the moneys withheld by the Secretary; which will leave a small balance due the United States.*

TREASURY DEPARTMENT,

First Comptroller's Office, August 19, 1881.

Thus: Judgment debt, principal.....	\$36,815 86
Interest at 6 per cent., 33 years and 16 days.....	72,998 01
Total due United States on judgment.....	109,813 87
Amount withheld by Secretary of Treasury.....	105,007 59
Balance required to satisfy judgment.....	4,806 28

IN THE MATTER OF CONTRACTOR'S CLAIM FOR PAYMENT OF CONTRACT ASSIGNED BY HIM AND PERFORMED BY THE ASSIGNEE.—CONTRACT-ASSIGNMENT CASE.

1. Section 3737 of the Revised Statutes provides that "no contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned * * *." The policy and intention of this provision are entirely in harmony with the provisions of section 3477 of the Revised Statutes, which prohibit the transfer or assignment of claims against the United States unless made after the issuing of the warrants for the payment thereof.
2. Section 3737 must be held to apply to all public contracts, unless subsequent legislation has modified, or made an exception to, its provisions. The only act which might appear to have such an effect is that of May 17, 1878, (20 Stats. 62.) Section 2 of this act provides that "hereafter no sub-letting or transfer of any mail contracts shall be permitted without the consent in writing of the Postmaster-General * * *." This provision cannot be construed to apply to any other contracts than those of the class mentioned in it.
3. The assignees of contracts with the Government for the furnishing of supplies cannot make themselves creditors of the Government. They are not recognized as having any contract with it. The statutes prescribe the mode by which a contract for Army supplies may be made, and the existence of a contract in any other mode cannot be admitted.
4. The accounting officers of the Treasury Department will not inquire into a claim for a *quantum meruit* in favor of a party who has purchased a contract in violation of the statute and rendered service thereunder, nor into a claim for a *quantum valebat* when supplies have been furnished in such case.
5. The obligation of a contract depends on the laws in existence when it is made: these are necessarily referred to in all contracts and form a part of them as the measure of the obligation to perform them by one party, and of the right acquired by the other.
6. A contract is not merely that which the parties expressly stipulate. It is that, also, which the existing laws of the country where the contract is made annex as conditions to it at the time when it was formed. These conditions enter into the contract, and form a part of it as completely as if they had been expressly stipulated by the parties themselves.
7. It would be repugnant to sound policy to permit an accessory to the violation of a statute to profit by his own unlawful act. The intention to prohibit transfers of public contracts must be observed in respect of all transactions or claims arising from such transfers. To allow parties to such transfers or transaction-compensation, whether under the principle of *quantum meruit* or *quantum valebat*, would be to do violence, under the color of law, to the intention of the law-makers.

Charles H. Davis, late of Fort McKavitt, Texas, entered into a contract at that place May 1, 1873, with the Quartermaster's Department

to furnish to that Department, at said fort, 875 cords of merchantable wood, and such additional quantity as might thereafter be required under the contract.

May 30, 1873, Davis transferred, by an instrument under seal, to the firm of Samuel Wallick & Co., "all of his right, title, and interest in and to" said contract. This firm bound itself to said Davis (1) in the sum of \$1,200 for the faithful performance of the contract, (2) to pay in hand to him "the sum of * * * lawful money of the United States, when the aforesaid contract shall have been returned approved by the proper authority."

The transfer was not assented to by the Government.

An account between the United States and the said Charles H. Davis, Form No. 9, (voucher to Abstract A,) was certified by Gregory Barrett, jr., first lieutenant and quartermaster 10th Infantry, "A. A. Q. M.," by which it appears that \$1,737 was claimed to be due to Davis for 579 cords of wood delivered in February, 1874, under said contract. Ten per cent., \$173.70, was withheld, and the balance, \$1,563.30, *plus* \$138, withheld on a previous voucher, was, February 23, 1874, paid by Lt. Col. S. B. Holabird, deputy quartermaster-general, at San Antonio, Texas, on a voucher signed as follows: "Chas. H. Davis, per Sam. Wallick & Co., att'ys in fact."

May 25, 1875, Treasury draft No. B 7470 was issued on war warrant No. 3766, dated May 22, 1876, to the order of Charles H. Davis, for \$173.70, (the amount withheld as above,) and sent, May 26, 1875, to said Col. Holabird, at San Antonio, Texas, for delivery. This officer, as appears from a letter dated January 21, 1879, addressed to Charles & George A. King, attorneys, Washington, D. C., and signed "John B. Hawley, Assistant Secretary" [of the Treasury], delivered the draft to Samuel Wallick & Co., under the authority of the said power of attorney.

December 4, 1878, Messrs. Charles & George A. King, attorneys for Davis, filed with the Secretary of the Treasury a power of attorney, dated, as acknowledged, December 3, 1878, from Charles H. Davis, of Monongahela City, Pennsylvania, authorizing them to collect for him from the United States the sum of \$173.70, the amount of said draft. Davis makes the following allegations in said power of attorney: (1) That he is the identical person named in said draft, and (2) "that said Wallack [Wallick] had no right or interest in or to said draft, nor to the possession thereof, for which reason payment of said draft was stopped" in October, 1875, by him, (Davis.) He therefore requests that a "new draft may issue to him in lieu thereof."

The Treasurer, in a letter dated July 17, 1877, states that the draft No. 7470 was issued on war warrant No. 3766 and sent to Col. Holabird; that at the request of Davis payment was stopped October 27, 1875, and that, "the draft being in existence, a duplicate cannot be issued." The draft is now in the hands of Samuel Wallick & Co.

Charles King and George A. King, for the claimant, cite *Di Cesnola's case*, 2 Lawrence, Compt. Dec., 142.

Samuel Wallick & Co. are not represented by counsel.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The evidence submitted tends to show that Davis did not perform any part of the service contracted for, and that Samuel Wallick & Co. did, as the assignee of the contract, furnish the wood charged for in the account referred to. Davis now asks for the issue of a duplicate draft, in order to collect the moneys withheld from Wallick & Co. in respect of the wood supplied by them.

Section 3737 of the Revised Statutes (Title XLIII, Public Contracts) provides that "no contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned * * *." This is a clear and positive provision against the transfer or assignment of public contracts. Its policy and intention are entirely in harmony with the provisions of section 3477 of the Revised Statutes, which prohibit the transfer or assignment of claims against the United States unless made after the issuing of the warrants for the payment thereof. Section 3737 must be held to apply to all public contracts, unless subsequent legislation has modified, or made an exception to, its provisions. The only act which might appear to have such an effect is that of May 17, 1878, (20 Stats., 62.) Section 2 of this act provides that "hereafter no sub-letting or transfer of any mail contracts shall be permitted without the consent in writing of the Postmaster-General * * *." It is unnecessary to decide now whether this language should be construed as authorizing such a transfer or assignment of a public mail contract as was clearly prohibited by section 3737, or whether its intention is merely to permit the substitution of service by a new contractor at the rate of compensation agreed upon in the original contract, without requiring a new advertisement or incurring the additional expense and delay of service which might be incident to such advertisement. Whatever the intention of section 2 of the act of May 17, 1878, may be with respect to public

contracts, it cannot be construed to apply to any other contracts than those of the class mentioned in it.

It clearly appears that the instrument which purports to have been operative, not only as a transfer of a public contract, but also as a power of attorney, had not the effect intended by the parties. Its only legal effect, "*so far as the United States are concerned,*" was to "cause the annulment of the contract." (Rev. Stats., sec. 3737.) The final paragraph of the instrument purports to be a power of attorney from Davis to Wallick & Co., granting to them full power and authority to perform all and every act requisite and necessary to be done in and about the premises. This instrument is defective as a deed, in that it is signed "Samuel Wallick & Co." without evidence setting forth the authority for so doing. The power of attorney is defective, in that it is not in any manner authenticated. (Rev. Stats., 1778, 3477.) The instrument is not, however, void as evidence of the intention of Davis to transfer the contract. The whole evidence shows that he did not perform any part of the service contracted for, and that Samuel Wallick & Co. did in part perform it; so that there was in fact a transfer of the contract. The stating of the pay account in the name of Davis does not avoid the effect of the provision of section 3737 which annulled the transferred contract of May 30, 1873, eight months before any wood was furnished under the assignment.

The case, then, is simply this: Davis asks payment for a service which he did not perform, and could not have assigned to another person for performance. If no part of the services had been paid for, Samuel Wallick & Co. would not, under the circumstances of the case, have any standing before the Department in a demand for compensation for the services they performed. (Rev. Stats., 3709, 3714, 3737.) The assignees of such contracts cannot make themselves creditors of the Government. They are not recognized as having any contract with it. The statutes prescribe the mode by which a contract for Army supplies may be made, and the existence of a contract in any other mode cannot be admitted. This effect of the statutes may sometimes work a great hardship to such assignees; but the remedy therefor is not within the executive or judicial branches of the Government. In such case, as was well said by Lord Campbell, "it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law." (*East India Company vs. Paul*, 7 Moore, Privy Council Cases, 111.)

The laws from which the Revised Statutes were compiled may sometimes be referred to in order to ascertain the true intent and spirit of

the language used in the revision. (*United States vs. Hirsch*, 100 U. S., 35; *United States vs. Bowen*, 100 U. S., 513.)

Section 3737 of the Revised Statutes was taken from the act of July 17, 1862, (12 Stats., 596, sec. 14.) Section 16 of this act subjected contractors for any description of supplies for the Army or Navy to the rules for the government of the armies and navies of the United States, and jurisdiction was conferred on courts-martial in cases wherein fraud or neglect of duty was charged in respect of contracts for such supplies. In the case of *Francis vs. United States* (11 Ct. Cls., 640) it was considered that this enactment was intended "to secure to the United States the personal attention and services of the contractor, and to render him liable to punishment * * * for any fraud or wilful neglect of duty;" that "no technical formal written transfer of the contract" need be proved, and that "it is sufficient to annul the contract if the facts disclose a substantial transfer of an interest therein, by whatever means attempted, or however much disguised." Before the enactment of this law, Attorney-General Stanton was of opinion that contracts for Army supplies were not assignable in the absence of approval by the Secretary of War. (10 Op. Att.-Gen., 4. And see *McAllister's case*, *ante*, 177; *Wheeler vs. United States*, 5 Ct. Cls., 504; *Wanless vs. United States*, 6 *Id.*, 123; *Field vs. United States*, 16 *Id.*, 434.) Section 16 of the act of July 17, 1862, has been omitted from the Revised Statutes, and the jurisdiction of courts-martial in respect of Army contractors no longer obtains; but the substantial part of the law remains in the prohibition against transfers. A further object of this prohibition, say the Court of Claims in the same case, was "to secure Government contracts to *bond-fide* contractors, who intended to perform the duties, as well as to assume the liabilities thereof, and to prevent parties from acquiring mere speculative interests, which are demoralizing and lead to irregularities and fraud." This is, unquestionably, a sound exposition of the true intent and spirit of the law.

Francis entered into a contract with the chief quartermaster of the military department of Dakota Territory for the sale and delivery of 1,000 cords of wood. He then made a power of attorney, "irrevocable," authorizing one Myrick to receive and sign all vouchers and draw the money thereon. Myrick performed all the work, delivered the wood, received payments and gave receipts "as the attorney in fact" of Francis. Subsequent to the making of the power of attorney, Francis, in consideration of money advanced, labor performed, &c., transferred to Myrick the claim for the damages for which the action was brought, and authorized him to sue in his (Francis's) name. The Court of Claims

held that the contract was annulled by the statute, and that no suit for damages could be maintained by either Francis or Myrick, even if there had been, under the general principles of the law of contracts, a good cause of action. The same doctrine is laid down in McCord's case, (9 Ct. Cls., 167,) in which it is held that the Court of Claims has no jurisdiction in the matter of an assignment of a contract; and also in Wheeler's case, (5 Ct. Cls., 509,) in which it is held that the court could not render judgment on such a contract. In the latter case, however, the court gave judgment against the United States in the following words:

"But it appears that the United States received and used forty cords of the wood delivered under the agreement, for which, on grounds of *quantum meruit*, the claimant, for the use of Gill, [the transferee of the contract,] is entitled to recover. We find it to be worth \$14.74 per cord, [contract price,] making \$589.60, for which judgment will be entered."

This mode and form of relief may be proper for courts; but the accounting officers of the Treasury Department will not inquire into a claim for a *quantum meruit* in favor of a party who has purchased a contract in violation of the statute and rendered service thereunder, nor into a claim for a *quantum valebat* when supplies have been furnished in such case. If the assignee of a public contract may recover a judgment in the Court of Claims on the grounds of a *quantum meruit* or *quantum valebat*, at the contract price for the service rendered or supplies furnished, it is difficult to perceive how the statute prohibiting the transfer can have any force, since the effect of the prohibition would be merely one of remedy. It is sufficient to say on this point that remedies and judicial proceedings are intended to give effect to laws, and not to defeat the purposes for which laws are enacted.

Public contracts are usually let to the lowest bidders. The price of the articles furnished, or the compensation for the service rendered, pursuant to such contracts, would, probably, as a rule, be the *quantum valebat* or *quantum meruit*. If accounting officers were to settle claims of parties to void contracts or assignments according to the reasoning of the Court of Claims, namely, that while such parties cannot recover on the express contracts, they can, nevertheless, recover on implied contracts, as a "*quantum meruit*" or *quantum valebat*, the amount which would have been due if the express contracts or the assignments had not been void, would not such a settlement give effect to the void contracts or void assignments, and defeat, in such cases, the whole policy of the statute?

It is a principle of law that "a contract is not merely that which the

parties expressly stipulate. It is that, also, which the existing laws of the country where the contract is made annex as conditions to it at the time when it was formed." (*Ogden vs. Saunders*, 12 Wheat., 231.) "These conditions enter into the contract, and form a part of it as completely as if they had been expressly stipulated by the parties themselves." (*Id.*; see *McCracken vs. Hayward*, 2 How., 612; *United States vs. Hawkins*, 10 Pet., 133; 2 *Parsons, Cont.*, 6th ed., 536, [683]; 1 *Greenl. Ev.*, 7th ed., 293, 294.) It must be held, by force of this principle, that the provision in section 3737 of the Revised Statutes making void all assignments of contracts was one of the stipulations in Davis's contract; and hence that the assignee had notice that the assignment was void. While it is a well-settled principle of law that if a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with the condition, or prevent or omit the performance of it, the opposite party is excused from proving a compliance with the condition. (*Williams vs. Bank of United States*, 11 Pet., 102; *Great Falls Mfg. Co. vs. United States*, 16 Ct. Cls., 197.) This principle cannot be invoked in the present case, because no officer or other person had authority to waive the condition against assignment, or to accept the service rendered by the assignees; and it was only as assignees that Samuel Wallick & Co. performed the service. No public officer can bind the Government by an act beyond, or contrary to, the authority given him by law. (*Johnson et al. vs. United States*, 5 Mas. C. C., 425; *United States vs. City Bank*, 2 McLean, 130.) The Quartermaster's Department has no authority to accept Army supplies furnished by the assignee of a public contract, because service by the assignee is prohibited by law. Mr. Justice Story, delivering the opinion of the circuit court in *Johnson et al. vs. United States*, (5 Mas. C. C., 441,) said: "The act of a public officer in violation of the duties of his office * * * cannot be permitted to have any legal effect by way of defence to those who have participated in the violation, and encouraged and aided it. I hold it most clear, that the acts of a public officer beyond the scope of his powers, and in violation of his public duties are, in such cases at least, utterly void."

The maxims *Ex maleficio non oritur contractus*, and *Ex pacto illicito non oritur actio*, are in conflict with any claim on the part of the contractor or his assignee to recover from the United States a *quantum valebat* for the wood delivered to the quartermaster. (*Dana's case. ante*, 203; *Subpœna case, ante*, 293; *Sprott vs. United States* 20 Wall. 459.)

There can be no valid *implied* contract except by the implied *assent* of the party liable to make payment thereunder. When, as in this case, there is no assent by the United States, and a claim grows out of an illegal assignment, there would seem to be no foundation for a *quantum valebat*. Undoubtedly, the United States might be liable, without previous contract, for wood received and used by an officer authorized to receive and use it, when the transaction is unconnected with any illegal contract. But when payment would, in effect, validate the illegal contract and defeat the whole purpose of the statute, accounting officers cannot aid in defeating that purpose.

Chief-Justice Marshall, delivering the opinion of the Supreme Court in the case of *Armstrong vs. Toler*, (11 Wheat., 278,) thus laid down, in the language of the circuit court, the rule respecting an illegal transaction, namely: "That where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be, in fact, only connected with the illegal transaction, and growing immediately out of it, *though it be in fact a new contract*, it is equally tainted by it." "No principle is better settled, than that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law." (*Id.*, 271.) The learned Chief-Justice, reviewing, in the case referred to, the leading English cases in respect to the question as to "how far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal," (*Id.*, 272-276,) says that "the law was correctly stated by the [circuit] court." (*Id.*, 279.) In *Peck vs. Burr*, (10 N. Y., 294,) it is said: "No recovery can be had for value parted with upon an illegal contract." That which is prohibited by statute is *malum prohibitum* and is made *malum in se*. A court will not aid a party to such contract. (*McDonald vs. Mayor*, 68 N. Y., 23; *Kennett vs. Chambers*, 14 How., 39; *Thomas vs. City of Richmond*, 12 Wall., 355; *Cope vs. Rowland*, 2 Crompt. Mee. and Ros., 157; 1 Pars. Cont., 458; *Chitty, Cont.*, 11th Am. ed., 1001; *State vs. Hastings*, 12 Wis., 596; *Donovan vs. Mayor*, 33 N. Y., 291; *Peterson vs. Mayor*, 17 N. Y., 449; *Nessmith and Nessmith vs. Sheldon et al.*, 4 McLean, 375.)

It would be repugnant to sound policy to permit an accessory to the violation of a statute to profit by his own unlawful act. To permit him to so profit would tend to encourage violations of law. The intention of prohibitory statutes is not to be defeated by indirect any more than by direct means. *Animus ad se omne jus ducit. Animus hominis est anima scripta*. So with the act of Congress. The intention

to prohibit transfers of public contracts must be observed in respect of all transactions or claims arising from such transfers. To allow parties to such transfers or transactions compensation, whether under the principle of *quantum meruit* or *quantum valebat*, would be to do violence, under the color of law, to the intention of the law-makers. It would be to interpret the law not *ex visceribus*, but to eviscerate from it all the force implied by the intention. *Viperina est expositio quæ corrodit viscera textus*. It would be to enable a party who has been an active agent in violating the statute to derive the full benefit of an assigned contract which for sufficient reasons of public policy is made void when assigned. If the doctrine of *quantum meruit* or *quantum valebat* were admitted to be applicable in such cases, it would in effect nullify the clearly expressed intention of Congress in respect of assignments of public contracts. It might to a large extent destroy all honest competition for public contracts. Fraudulent bids might be put in by unprincipled men at a rate so low as to secure to them large contracts without any intention on their part of ever fulfilling or performing the contracts. The contractors might then sell or assign their contracts to other persons, who could, "so far as the United States are concerned," (Rev. Stats., 3737,) repudiate the sale or assignment as being contrary to law, and demand for the service performed or the goods delivered a *quantum meruit* or *quantum valebat*. If the assignees be paid such value as they may prove by such evidence as they may procure, they will in such case receive for service rendered or goods supplied, not merely the contract price, but sums largely in excess of the original contract price. This would certainly defeat the whole public contract system. If it be said, in objection to this view of the case, that a man is entitled to the fruit of his own labor, the answer is that this principle can apply only to a case where the labor has been lawfully applied, (The Society for the Propagation of the Gospel *vs.* Wheeler *et al.*, 2 Gall. C. C., 143,) and not in a case where the employment was forbidden by law and public policy. But whether the assignees of the contract have any legal or equitable rights, in respect of the draft in question. Davis is certainly entitled to no relief, as he performed no part of the contract. According to the evidence in the case and the decisions referred to, Samuel Wallick & Co. were not his agents; and, besides this, they had no valid authority to receive any money or drafts in the name of Davis. The quartermaster delivered the draft without authority. He unlawfully paid money *on the contract*, and had no right to be credited in his accounts with any such payment.

The outstanding draft should not be paid. It is no longer negotiable.

(Di Cesnola's case, *ante*, 142; McAllister's case, *ante*, 167.) It was not negotiable at the time payment was stopped. It was issued May 25, 1875. The claim on which it was issued was adjusted under the jurisdiction of the Third Auditor and Second Comptroller. The money appropriated for its payment has been covered into the Treasury, and it is not available, even though the claim to receive payment were a valid one.

The Revised Statutes provide:

SEC. 306. At the termination of each fiscal year all amounts of moneys that are represented by certificates, drafts, or checks, issued by the Treasurer, or by any disbursing officer of any Department of the Government, upon the Treasurer or any assistant treasurer, or designated depository of the United States, or upon any national bank designated as a depository of the United States, and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for *three years* or more remained outstanding, unsatisfied, and unpaid, shall be deposited by the Treasurer, to be covered into the Treasury by warrant, and to be carried to the credit of the parties in whose favor such certificates, drafts, or checks were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated "outstanding liabilities."

SEC. 307. The certificate of the Register of the Treasury, stating that the amount of any draft issued by the Treasurer, to facilitate the payment of a warrant directed to him for payment, has remained outstanding and unpaid for three years or more, and has been deposited and covered into the Treasury in the manner prescribed by the preceding section, shall be, when attached to any such warrant, a sufficient voucher in satisfaction of any such warrant or part of any warrant, the same as if the drafts correctly indorsed and fully satisfied were attached to such warrant or part of warrant. And all such moneys mentioned in this and in the preceding section shall remain as a permanent appropriation for the redemption and payment of all such outstanding and unpaid certificates, drafts, and checks.

SEC. 308. The payee or the bona-fide holder of any draft or check the amount of which has been deposited and covered into the Treasury pursuant to the preceding sections, shall, on presenting the same to the proper officer of the Treasury, be entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor, according to the practice in other cases of authorized and liquidated claims against the United States.

And see sections 3645, 5495, 5496.

If the payee of this draft were entitled to payment under these provisions, a new account would be stated by the First Auditor, because jurisdiction in respect of such an account has not been specifically assigned to any other Auditor. (Sister Elizabeth's case, *ante*, 120.) The account provided for in section 308 is, within the meaning of sec-

tion 277 of the Revised Statutes, an account "accruing in the Treasury Department." The certificate made by the Register of the Treasury under the provisions of section 307 is sent to the First Auditor as a voucher pertaining to the account of the United States Treasurer. A warrant for payment of an account stated under section 308 could not in any event be paid unless countersigned by the First Comptroller; and the statute gives this officer jurisdiction to determine in respect of every warrant submitted for his counter-signature whether it is "warranted by law." (Rev. Stats., 269; Bender's case, 1 Lawrence, Compt. Dec., 317.) In the exercise of this jurisdiction, the First Comptroller was authorized, when the warrant on which the draft in question issued was submitted to him, to decide whether the payment it directed to be made was "warranted by law." He may, therefore, when the draft has not been delivered, and when there is an application for payment, which would involve the statement of an account and the issue of a new warrant, pass upon the question as to whether the claim for which the original warrant was issued was a valid one. (Rev. Stats., 191, 269.)

If a claim arising on a draft which had actually been delivered to the claimant or his authorized agent, and which has remained "unpaid for three years," should be presented, it might become important to decide as to whether the question of the original right to payment would be still open for decision or has been conclusively settled. In such case it might be urged, in respect of the payee, that the question is subject to be reopened, because the First Auditor is to "receive and examine" the account, (Rev. Stats., 277;) and it is the duty of the First Comptroller (1) "to *examine* all accounts settled by the First Auditor except * * *," (Rev. Stats., 269; *Watkins vs. United States*, 9 Wall., 764; 1 Lawrence, Compt. Dec., Appx., 540;) (2) to certify the balance reported, (Rev. Stats., 191;) and, finally, to decide whether a warrant for its payment is "warranted by law." (Rev. Stats., 269; 1 Lawrence, Compt. Dec., Appx., 549-559.)

It has been shown that the claimant in this case was not, on the facts presented, ever entitled to payment. The First Comptroller could not now, on a claim based on the draft, countersign a warrant in his favor without admitting a right to payment which did not, on the facts as they now appear, originally and properly exist.

This is not a case in which a duplicate draft can lawfully be issued. Such duplicate can only issue when the original could have been lawfully paid. (Rev. Stats., 306-308.) If the draft had been actually delivered to the claimant, (as it was not,) it would be a sufficient objection

to the allowance of a claim based thereon that it is not shown to have been indorsed to a *bond-fide* holder. There may be some presumption, from the fact that it has not been presented for payment, that the draft was not so indorsed. Had the draft been delivered to the claimant, it might, however, have been indorsed on the day it was received to a *bond-fide* holder, who, by reason of its loss, or for other cause, failed to present it for payment, and who, if living, might yet do so; or, if not living, it might be presented by his legal representative. If the claimant had a right to payment of the draft, it would be unsafe to certify an account for payment now without evidence from the payee that he did not indorse the draft. If it be assumed that he could and would prove that he did not indorse it, or that no agent for him did so, there would still remain a sufficient objection to the issue of a duplicate or to making any payment to the claimant. The draft was never delivered to him or to any person who was entitled to receive it. Until it has been so delivered, both it and the warrant on which it was issued are subject to revocation by the First Comptroller. (Bender's case, (second,) 1 Lawrence, Compt. Dec., 405.)

In order to prevent payment hereafter of the sum which is now standing to the credit of the claimant on the books of the Register of the Treasury, in pursuance of repay warrant No. 941, July 11, 1878, the First Auditor may be requested to state an account in favor of the claimant payable from the appropriation for "outstanding liabilities," the payment to be made to the Treasurer of the United States, for deposit on account of "barracks and quarters, 1879, and prior years," no personal credit to be given. But if this be not done, the revocation and cancellation of the countersigning of the original warrant would be a conclusive bar against any future demand of the claimant in respect of the matter, whether so entered on the warrant or not. But whether, as suggested in relation to the appropriation, the transfer be made or not, the claimant can never lawfully avail himself of the benefit of the amount now standing to his credit on the books of the Register.

The claimant is entitled to no relief, and his claim is disallowed.

TREASURY DEPARTMENT,

First Comptroller's Office, August 22, 1881.

IN THE MATTER OF THE RIGHT TO SUBPENA FOR THE DEFENCE IN A CRIMINAL SUIT, AT THE EXPENSE OF THE GOVERNMENT, WITNESSES RESIDING MORE THAN 100 MILES FROM THE PLACE OF TRIAL.—GUILTEAU'S CASE.

1. The First Comptroller has no jurisdiction to finally *decide* a question in respect of accounts until the proper Auditor has acted thereon. (Rev. Stats., 269, 277; 15 Op. Att.-Gen., 139.) But the *opinion* of the First Comptroller is frequently and properly taken in advance of payments, lest, in cases involving questions of law, such payments might not be finally allowed.
2. Section 12 of the act of February 22, 1867, (14 Stats., 407, 408; sec. 839 of the Revised Statutes of the District of Columbia,) which provides that "In all criminal trials the supreme court, or the judge trying the case, may allow such number of witnesses on behalf of the defendant as may appear necessary; the fees thereof, with the costs of service, to be paid in the same manner as Government witnesses are paid," is not repealed by the operation of the last clause of section 34 of the act of February 21, 1871, (16 Stats., 426; Rev. Stats. Dist. Col., 93,) which makes the act of August 8, 1846, section 11, apply in the District of Columbia, if it is not locally inapplicable.
3. Section 11 of the act of August 8, 1846, (9 Stats., 74; Rev. Stats. U. S., 874,) which provides that, in cases of criminal prosecutions, witnesses *within* the district in which the court is held, or within one hundred miles of the place of trial, may, on order of the court, be subpoenaed at the expense of the Government in behalf of indigent defendants, is not locally inapplicable in the District of Columbia; and it is, therefore, by the operation of section 34 of the act of February 21, 1871, in force in the District of Columbia.
4. These provisions of the acts of February 22, 1867, (Rev. Stats. Dist. Col., 839,) and August 8, 1846, (Rev. Stats. U. S., 874,) in respect of witnesses for the defence in criminal prosecutions, are not necessarily inconsistent with each other. There is a reason why the two acts may consist together and operate concurrently, viz: They provide different relief for different contingencies.
5. In the case of witnesses within a hundred miles, the court is not in terms clothed with discretion as to the number of witnesses for the defence who are to be paid. The court, on showing made, may order payment at the expense of the Government to witnesses for the defence who are subpoenaed within or beyond a hundred miles from the place of trial. This may, perhaps, be held obligatory; if not, the court may either grant the order or refuse it.
6. The laws require an examination in open court of the accounts of marshals. But section 846 of the Revised Statutes (U. S.) provides as to such accounts that "they shall then be subject to revision upon their merits by said accounting officers [of the Treasury Department], as in case of other public accounts: *Provided*, That no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs."
7. Section 855 provides that "in cases where the United States are parties, the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the Treasury in his accounts."

8. These sections of the Revised Statutes of the United States are made applicable to the courts of the District of Columbia by the act of February 21, 1871, (16 Stats., 426, sec. 34,) now section 93 of the Revised Statutes relating to the District of Columbia; and by section 910 of the latter it is the duty of the marshal of the District to pay witnesses pursuant to the order of the court.
9. Whenever a proper order is made by a court or commissioner taxing the fees and costs of witnesses in a case, and such fees and costs are paid by the marshal, credit therefor must be allowed in the settlement of the marshal's accounts.
10. The marshal for the District of Columbia will be allowed, in the settlement of his accounts, credit for vouchers showing payment of the fees and costs (as the same may be taxed by the court) of witnesses who attend, in pursuance of the order of the court, for the defence in the trial of Guiteau.

October 20, 1881, George B. Corkhill, esq., United States attorney for the District of Columbia, addressed a letter to the First Comptroller, stating that the counsel for Charles J. Guiteau, now under indictment in this District for the murder of James A. Garfield, late President of the United States, had filed in the supreme court of the District an application for an order of court for the summoning of witnesses for the defence from various parts of the United States, without reference to their distance from Washington City, at the expense of the United States; suggesting that if the court should make the desired order, it would involve a large expenditure, and the payments would have ultimately to pass the scrutiny of the First Comptroller; and hence requesting from the Comptroller "an expression of opinion upon the question of the liability of the United States to pay the expenses of witnesses for the defence when residing at a greater distance from the place of trial than one hundred miles." With the letter the district attorney enclosed a copy of the brief presented to the court by counsel for Guiteau in support of the application referred to.

George Scoville, attorney for Guiteau, in the brief of which Mr. Corkhill encloses a copy, claims as follows: That the act of February 22, 1867, (14 Stats., 407, sec. 11 [12],) is a special law for a specific purpose, and is not repealed by the general act of February 21, 1871, (16 Stats., 426, sec. 34, last clause,) as applied to the act of August 8, 1846, (9 Stats., 74, sec. 11.) A special statute for a specific purpose is not repealed by a general act. (*Pearce vs. Bank of Alabama*, 693; *Blain vs. Bailey*, 25 Ind., 165.) The intention of Congress is indicated unmistakably on this subject subsequent to February 21, 1871.

An act was passed in 1874, approved June 22, 1874, entitled "An act to revise and consolidate the statutes of the United States, *general and permanent in their nature, relating to the District of Columbia*, IN FORCE ON THE 1ST DAY OF DECEMBER," A. D. 1873. (Rev. Stats. Dist. Col., 1, 149.) Section 839 of this act is the one first above given,

(sec. 12, act Feb. 22, 1867,) and is thereby declared by Congress to have been "general and permanent in its nature," and to have been "in force on the 1st day of December," A. D. 1873. When thereafter, and through what repealing power, did it cease to be "in force?" Certainly not through the act of 1871, nor through that of 1846, nor through both combined, for both had been operative from and after the 21st day of February, 1871, and yet Congress solemnly declared in 1874 that the act of 1867 was in full force and unrepealed on the 1st day of December, 1873. And it was re-enacted conjointly with the declaration of Congress that it was in force December 1, 1873, on the 22d day of June, 1874, as a law *general* and PERMANENT in its nature, specially for the benefit of defendants in criminal prosecutions in the supreme court of the District of Columbia.

Further evidence of the intention of Congress to provide liberally for the defence of accused persons is found in the act of March 3, 1865, (13 Stats., 528,) authorizing depositions for or on behalf of the accused, when the witness resides more than one hundred miles from Washington City, in full force when the act of 1867 was passed, and also incorporated into the Revised Statutes of the District in June, 1874, making sections 881 to 893, inclusive. With the acts of 1846 and 1865 both in force, Congress added the act of 1867. The case of *Page vs. Burnstine*, 102 U. S., 664, does not sustain the position that section 839 was repealed June 22, 1874, by the re-enactment on that day of the acts of 1846 and 1871. The question in that case was whether a proviso enacted March 3, 1865, as an amendment to a general law of July 2, 1864, was also applicable as an amendment to a special law relating to this District of the same general character as the general law of 1864; and the court held it to be so applicable by virtue of the act of February 21, 1871. This statement shows at a glance the difference in the two cases. In the one case, to give the construction asked absolutely repeals a special law by implication; in the other, the decision of the Supreme Court extends an amendment of one law affecting the whole country so as to make it apply to a like statute of this District.

George B. Corkhill, United States attorney, in his letter to the Comptroller says:

"My conviction is very strong that no such interpretation as that put upon it by Mr. Scoville can reasonably be given to section 839 of the Revised Statutes of the District, but that here, as elsewhere, the defendant can only summon at the expense of the United States witnesses living in the District or within one hundred miles of the place of trial.

"No opinion has been made upon the subject by the presiding justice as yet."

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

It is the duty of the First Auditor "to receive and examine * * * all accounts of the judges, marshals, clerks, and other officers of all the courts of the United States." (Rev. Stats., 277.) The marshal of the District of Columbia is the disbursing officer charged with the duty of paying fees of witnesses in cases tried in the courts of the District. (Rev. Stats. Dist. Col., 910; Rev. Stats. U. S., 855.)

The First Comptroller is required to examine accounts of this class settled by the First Auditor, including accounts of marshals as disbursing officers. (Rev. Stats., 269.) The First Comptroller has no jurisdiction to finally *decide* a question in respect of such accounts until the First Auditor has acted thereon. (Rev. Stats., 269, 277; 15 Op. Att.-Gen., 139.) But the *opinion* of the First Comptroller is frequently and properly taken in advance of payments, lest, in cases involving questions of law or fact, such payments might not be finally allowed. The First Comptroller, however, would not, as a general rule, express an opinion in advance of the proper action of the First Auditor, and prior to the time required for payment, and while a question as to the propriety of and authority for incurring expenses is pending in the court. The proper judge of the supreme court of the District has, however, since the date of the letter of the attorney of the United States, decided that the court has authority to issue subpœna for the witnesses, in accordance with the application made by Guiteau's counsel.

The opinion of the court (Mr. Justice Cox, is as follows:

An application is made to the court to pass an order allowing fees to witnesses residing at a distance of more than one hundred miles from Washington, who are to be summoned for the defence, together with the costs of service. It is made under section No. 839 of the Revised Statutes of the District, which is in these words, viz:

"In all criminal trials the supreme court, or the judge trying the case, may allow such number of witnesses on behalf of the defendant as may appear necessary; the fees thereof, with the costs of service, to be paid in the same manner as Government witnesses are paid."

This court, as I learn from my brethren and the older practitioners at this bar, has repeatedly exercised the power which is now invoked, and which seems to be clearly conveyed by the general and comprehensive terms of the statute. The doubt which I have felt on the subject grew out of the ruling of the Supreme Court in the case of *Page vs. Burnstine*, 12 Otto. By an act of 1864 (June 22) parties to suits in the courts of this District were rendered competent to testify upon the trial of their own cases, (with exceptions not material to this question.) By an act of 1865, applying to the courts of the United States generally, and not to the District, this privilege was denied where one of the parties should be an executor or administrator as to any transaction with or statement by the deceased, &c. On the 21st of February, 1871,

the act was passed establishing a government for the District of Columbia, containing this section, viz:

"The Constitution and all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States." [Last clause of section 34.]

In the case of Page *vs.* Burnstine the Supreme Court held that the effect of the last-mentioned enactment was to make the act of 1865 before mentioned a part of the law of the District. The doubt which this case suggested to me was whether this same provision of 1871 did not put in force in this District an act of 1846, applying to the United States courts outside of the District, providing that 'whenever any person indicted in a court of the United States makes affidavit setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held or within one hundred miles of the place of trial, &c., * * * in such case the costs incurred by the process and the fees of witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States;' and whether this law, conferring the power in question only as to witnesses who are within a hundred miles of the place of trial, did not, by implication, repeal the larger power conferred on the courts of this District. I think, however, that I can perceive differences between the question determined in the case cited and the present one. The restriction upon the party's privilege of testifying created by the act of 1865, when made a part of the law of this District, being inconsistent with the unqualified privilege which before prevailed, necessarily operated a repeal *pro tanto* of the existing law. On the other hand, there is no necessary inconsistency between the act of 1846 in the general statutes and the act of 1867, passed for the District of Columbia, in reference to defendant's witnesses. The act of 1846 is not a restrictive, but an enabling act, and so is the other. Two acts conferring at different times different degrees of authority, although the more limited one be later in time, are not necessarily conflicting. They are not so in terms. If they are, it must be because of implication from the narrower act that the larger was designed to be modified. This implication is not a necessary one, and whether it is a proper one in a particular case must depend upon its circumstances. If the act of 1846 had been enacted anew, singly and especially for the District, inasmuch as the court of the District already possessed a larger power, it would be a natural suggestion that such an act would be unnecessary, unless it was intended, by implication, to curtail the powers already conferred. But when it is borne in mind that the act of 1871 was a sweeping clause, embracing all possible subjects, and there is no reason to suppose that any special attention was given to this particular subject, there is not the same reason for holding that the one act was intended to repeal the other, or that the existing powers of this court were intended to be curtailed. And there is a reason why the two acts may consist together and operate concurrently, viz., that they provide different relief for different contingencies. In the case of witnesses within a hundred miles, the court is not in terms clothed with discretion as to the number of witnesses for the defence who are to be paid. The court, on the showing made, may order payment for the witnesses. This may, perhaps, be held obligatory; or, if not, the court has simply to order or refuse.

But under the general power, conferred without limit as to distance by the act of 1867, the court is to fix the number of witnesses to be allowed for the defence and paid by the United States. I do not think, therefore, that the two acts are inconsistent, if both are considered in force here. But it may be doubted whether the act of 1846 is to be considered as locally applicable here. The term district, within which the witnesses must be, means undoubtedly the judicial district of the Federal judiciary system, whereas the District of Columbia is not a judicial district of that system. It is unnecessary, however, to discuss the subject more at length. I will consider at chambers what and how many witnesses ought to be allowed for the defence at the expense of the Government.

Pursuant to this opinion the following order was made by the court:

"On application of the defendant in this case, and cause being shown to the satisfaction of the court, it is hereby ordered that twenty witnesses be subpœnaed in behalf of the defendant to attend on the trial of this case, and to be designated by counsel for the defendant, the fees and costs of service to be paid as like fees and services are paid on behalf of the Government according to the statute in such case made and provided. This order is made without prejudice to the right of the defendant to ask for a further order for an additional number of witnesses, should it be necessary to do so in the opinion of his counsel."

The laws require an examination in open court of the accounts of marshals. (Rev. Stats. U. S., 824, 829, 846; 1 Sup. to Rev. Stats. U. S., ch. 95, pp. 145, 147; 18 Stats., 333, 452; 15 Op. Att.-Gen., 108; 16 Op., 165. See Hayburn's case, 2 Dall., 410-414.) But section 846 of the Revised Statutes (U. S.) provides as to such accounts that "they shall then be subject to revision upon their merits by said accounting officers [of the Treasury Department], as in case of other public accounts: *Provided*, That no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs."

Section 855 provides that "in cases where the United States are parties, the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the Treasury in his accounts."

These sections are made applicable to the courts of the District of Columbia by the act of February 21, 1871. (16 Stats., 426, sec. 34,) now section 93 of the Revised Statutes relating to the District of Columbia; and by section 910 of said revision it is the duty of the marshal of the District to pay witnesses pursuant to the order of the court. The result is, that whenever a proper order is made by the court taxing the fees and costs of witnesses in a case, and such fees and costs are paid by the marshal, credit therefor must be allowed in the settlement

of the marshal's accounts. Such fees or costs when not paid by the marshal could be paid otherwise. (Senate-Disbursement case, *ante*, 404.) But in such case the whole question of the legal right to the payment would be open for the decision of the accounting officers.

The supreme court of the District of Columbia has decided, in a clear and able opinion fully sustained by law, that it is proper to make an order for the summoning of the witnesses in accordance with the application made by Guiteau's counsel.

The marshal for the District of Columbia will be allowed, in the settlement of his accounts, credit for vouchers showing payment of the fees and costs (as the same may be taxed by the court) of witnesses who attend, in pursuance of the order of the court, for the defence in the trial of Guiteau.

TREASURY DEPARTMENT,

First Comptroller's Office, October 26, 1881.

IN THE MATTER OF REFUNDING COST OF PROPRIETARY STAMPS UNNECESSARILY USED, AND OF THE BEARING OF THE TWO YEARS' LIMITATION ON SUCH REFUNDS.—WORRALL'S CASE.

1. The conflicting opinions of the Attorneys-General rendered January 7, 1875, (14 Op., 513,) and January 16, 1878, (15 Op., 426,) examined, and the latter concurred in.
2. Officers on whom statutes expressly confer a defined and exclusive jurisdiction are not bound to accept the opinion of the Attorney-General in respect of matters within such jurisdiction.
3. The words "Internal-revenue adhesive stamps" are, by popular usage and by the definitions of lexicographers and political economists, regarded as synonymous with the words "internal taxes."
4. The popular and general legal meaning of a word or phrase used in a statute may in construction be restrained, qualified, enlarged, or limited, if it be apparent from other terms in the statute that the legislature so intended.
5. The Revised Statutes make two distinct and separate provisions for a refund of internal-revenue taxes improperly paid or exacted: one in sections 3220 and 3222, for a refund of *money-taxes* improperly collected; and one in section 3426, for *stamps* improperly required to be affixed. Section 3228 imposes a limitation of two years on money-tax refunds, but its limitation does not apply to stamp-tax refunds.
6. If internal-revenue officers require proprietary internal-revenue stamps to be "erroneously or illegally" used by manufacturers or dealers, a right to a refund therefor exists under section 3426.
7. The act of March 1, 1879, (20 Stats., 349,) prescribes a limitation in respect of the time for presenting such claim for a refund.

8. The distinction between "stamps" and "money-taxes" stated. The former are not money-taxes, although the revenue laws require them to be sold and the money collected from their sale to be paid into the Treasury
9. The approval by the Commissioner of Internal Revenue of a claim for a refund of stamps unnecessarily used, or his approval of a claim for a refund of money paid as internal taxes, is not conclusive on the First Comptroller. The latter must decide whether the claim is just and valid.

March 22, 1864, L. H. Spear secured letters-patent for "Spear's fruit-preserving solution." In June, 1864, the claimant, L. P. Worrall, commenced purchasing in bulk from Spear this "fruit-preserving solution," paying therefor by the gallon. Worrall prepared the same for sale by putting the solution in small bottles to be sold at retail at \$1 per bottle. He also purchased and affixed to each bottle the 4-cent internal-revenue stamp prescribed in Schedule C, section 110, of the act of July 1, 1862, (12 Stats., 484,) and Schedule C, section 170, of the act of June 30, 1864. (13 Stats., 301. See sec. 173, p. 303.) During part of the years 1874 and 1875, Mr. Worrall himself manufactured the solution under the superintendence of Spear, the patentee. In 1868, Spear secured letters-patent for the "American fruit-preserving powder." This preparation was thereafter purchased in bulk from Spear by the claimant, Worrall, and put up in small stamped packages for sale at retail. Mr. Worrall continued in the business of dealing in the said preparations; and, until September 20, 1877, he affixed, under the ruling of the Commissioner of Internal Revenue and by direction of the collector of his district, to each bottle or package thereof the internal-revenue stamp mentioned in the schedules referred to, on which date he was advised by the Commissioner of Internal Revenue that the said articles were not subject to stamp tax. From May, 1866, to September 20, 1877, Worrall affixed the stamps under protest, the affixing having been required by the collector.

Worrall considers that the words "or other medicinal preparations," in the first clause of Schedule C, following section 170 of the act of June 30, 1864, (Rev. Stats., 3437, Schedule A,) exempted this class of preparations from stamp-tax on and after August 1, 1864, (act June 30, 1864, sec. 151; 13 Stats., 291,) and that the stamps used on said preparations after July 31, 1864, were not required by law; and he therefore makes claim, under section 3426 of the Revised Statutes, for a refund of the money paid for the stamps affixed by him after the latter date.

June 22, 1880, the Commissioner of Internal Revenue certified in respect of this claim as follows:

"That Lewis P. Worrall, of New York City, has submitted to this office satisfactory evidence that internal-revenue proprietary stamps

of the face value of six thousand five hundred sixty-one and $\frac{2}{100}$ dollars (\$6,561.92) have been unnecessarily used, and that a claim for refunding the value of the stamps above mentioned was received at this office December 5, 1877. I further certify that I have made an allowance to the said Lewis P. Worrall of five thousand eight hundred forty-three and $\frac{5}{100}$ dollars, (\$5,843.50,) being the value of said stamps after deducting therefrom five per centum, and three hundred ninety and $\frac{3}{100}$ dollars (\$390.32) ad valorem tax due the United States, and that he is entitled to have said amount refunded to him as provided in section 3426, Revised Statutes of the United States, as amended by section 17 of the act of March 1, 1879." (20 Stats., 349.)

Only \$184.48 worth of said stamps were used after December 4, 1875.

The Fifth Auditor stated an account for payment of the claim, and per Report No. 27747, referred it to the First Comptroller, who has now to decide whether the claim should be reported to Congress for an appropriation under the act of June 14, 1878. (20 Stats., 130.)

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

Section 4 of the act of June 14, 1878, makes it the duty of the several accounting officers of the Treasury to continue to receive, examine, and consider the justice and validity of all claims under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of section 5 of the act of June 20, 1874, (18 Stats., 110,) that may be brought before them within a period of five years, and of the Secretary of the Treasury to report, at the commencement of each session of Congress, to the Speaker of the House of Representatives, the amount found due to each claimant.

The appropriation out of which this claim, if valid, would have been payable has been either exhausted or the unexpended balance thereof has been covered into the Treasury and is not now available. If the First Comptroller had, while the appropriation was available, jurisdiction "to receive, examine, and consider the justice and validity" of this claim, he may now, under the provisions of the act of 1878 above referred to, continue to exercise that jurisdiction. If he had not such jurisdiction, it is obvious that this claim is not one within the purview of that act, and that the amount which may be due the claimant cannot be reported to the Speaker of the House of Representatives for an appropriation. It has been shown in 1 Lawrence, Compt. Dec., Appendix, pp. 523-549, that the First Comptroller is clothed with this jurisdiction, and he will now exercise it in respect of the present claim.

It has already been decided that the Commissioner's approval is not conclusive. (Savings-Bank case, 1 Lawrence. Compt. Dec., 194; Bender's case, *Id.*, 339.)

It was at one time maintained by Attorneys-General that the President could control the settlement of accounts. (Taney, September 10, 1831, 2 Op., 463; Cushing, January 6, 1857, 8 Op., 293.)

This was denied. (Wirt, March 7, 1823, 1 Op., 596, January 13, 1824, 1 Op., 636, February 19, 1825, 1 Op., 705, 706; Taney, December 14, 1831, 2 Op., 480; Gilpin, March 16, 1840, 3 Op., 500; Crittenden, November 13, 1852, 5 Op., 630; Bates, March 8, 1864, 11 Op., 14, October 8, 1864, 11 Op., 108.)

It was then held that heads of Departments could control accounting officers. (Berrien, December 4, 1829, 2 Op., 302; Butler, May 17, 1834, 2 Op., 652; Johnson, April 19, 1849, 5 Op., 87; Crittenden, November 13, 1852, 5 Op., 630; Cushing, June 25, 1856, 7 Op., 724, January 6, 1857, 8 Op., 293; Bates, April 25, 1862, 10 Op., 231, January 13, 1863, 10 Op., 435, March 8, 1864, 11 Op., 14, October 8, 1864, 11 Op., 108; Speed, December 23, 1864, 11 Op., 129; Stanberry, September 15, 1866, 12 Op., 43.)

This was denied. (Wirt, October 20, 1823, 1 Op., 624, July 27, 1824, 1 Op., 678; Taney, April 5, 1832, 2 Op., 507, December 18, 1832, 2 Op., 544; Crittenden, September 12, 1850, not printed.)

Finally, the question was settled by the act of March 30, 1868, now section 191 of the Revised Statutes. (Hoar, March 25, 1869, 13 Op., 5, February 19, 1870, 13 Op., 218; Williams, July 22, 1872, 14 Op., 65, August 19, 1872, 14 Op., 101; Taft, August 2, 1876, 15 Op., 139, February 7, 1877, 15 Op., 192; Devens, May 5, 1877, 15 Op., 626, May 21, 1880, 16 Op., 494.)

Before passing on the question whether the claim should be reported to Congress for an appropriation, it will be necessary to ascertain whether the claim is a just and valid one, and, if it is, the amount due to the claimant.

It is apparent, from the provisions of the statutes cited in the statement of the case, that the claimant used the "proprietary stamps" involved in his claim when the law did not require them to be used. This fact establishes the justice of the claim, and also its validity as a claim before the Comptroller, unless executive action thereon is barred wholly or in part by the statute of limitation. In effect, therefore, the sole question for decision is: Was this claim presented to the Commissioner of Internal Revenue "within two years next after the cause of action accrued"? The answer to this question depends upon the construction to be given to the following provisions of the Revised Statutes:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations* prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes errone-

*See pages 502-3, *post*.

ously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty * * *." (Act June 30, 1864, sec. 44, 13 Stats., 239; Act July 13, 1866, sec. 9, 14 Stats., 111; Act December 24, 1872, sec. 1, 17 Stats., 401.)

"SEC. 3228. All claims for the refunding of any internal tax alleged to have been [1] erroneously or illegally assessed or collected, or [2] of any penalty alleged to have been collected without authority, or [3] of any sum alleged to have been excessive or [4] in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date." (Act June 6, 1872, sec. 44, 17 Stats., 257.)

"SEC. 3426. The Commissioner of Internal Revenue may, from time to time, make regulations, upon proper evidence of the facts, for the allowance of such of the stamps issued under the provisions of this chapter, or any internal revenue act, as may have been [1] spoiled, [2] destroyed, or [3] rendered useless or unfit for the purpose intended, or [4] for which the owner may have no use, or [5] which through mistake may have been improperly or unnecessarily used, or [6] where the rates or duties represented thereby have been paid in error, or remitted; and such allowance shall be made either by giving other stamps in lieu of the stamps so allowed for, or by repaying the amount or value, after deducting therefrom, in case of repayment, the sum of five per centum to the owner thereof * * *." (Act June 30, 1864, sec. 161, 13 Stats., 294; amended by Act July 12, 1876, 19 Stats., 88; amended by Act March 1, 1879, sec. 17, 20 Stats., 349. See Richardson's Supplement to Revised Statutes, [132,] 227, 228, 446, 447.)

The act of March 1, 1879, section 17, amending section 3426 of the Revised Statutes, provides among other things as follows:

"That claims for allowance on account of stamps arising under section thirty-four hundred and twenty-six of the Revised Statutes as restricted by 'an act relative to the redemption of unused stamps,' approved July twelfth eighteen hundred and seventy-six, may be allowed, if presented within three years after the purchase of said stamps from the government, or a government agent for the sale of stamps, and not otherwise: *Provided*, That no existing claim for the redemption of or allowance for any internal-revenue stamps other than the two-cent documentary stamps shall be allowed, unless presented within one year from the date of the passage of this act: *Provided further*, That from and after June thirtieth, eighteen hundred and seventy-nine, no allowance shall be made, in any manner, for documentary stamps other than those of the denomination of two cents." (20 Stats., 349.)

Other changes have been made in the statutes, but in no way adversely affecting the claim now made.

The Attorney-General, in an opinion dated January 7, 1875, (14 Op., 513,) held that claims for an allowance for stamps under section 3426 of the Revised Statutes are barred by section 3228, when not presented within the time prescribed by the latter section. He says: "There can be no rational doubt that stamps or stamp duties are internal taxes. They are, therefore, within the meaning of section 3228, Revised Statutes * * *." This opinion, it will be observed, antedates the legislative construction apparently given by the act of March 1, 1879, and which, possibly, may have resulted from the opinion of the Attorney-General of January 16, 1878, (15 Op., 426,) in which it was held, as set forth in the syllabus, that "the limitation in section 3228, Revised Statutes, relative to claims for the refunding of internal-revenue taxes has no application to claims for allowances for stamps under section 3426, Revised Statutes." The Attorney-General says in this opinion that he is "unable to adopt the view on the same subject" taken in 14 Opinions, 513, and that he arrives at "just the opposite of that view."

On the question now involved, it is manifest that, since these opinions differ entirely, both cannot be correct. The opinions of the Attorneys-General are always entitled to the highest respect; but so far as the accounting officers of the Treasury Department are concerned, when they are exercising a jurisdiction which is intrusted by statute exclusively to them, and which, for most purposes, gives to their judgment a conclusive and authoritative character, as in the case of the claim now under consideration, no opinion by an Attorney-General can be authoritative, and no one opinion can be considered as overruling another. In matters within their jurisdiction, the accounting officers must at last judge for themselves, and act on their own judgment. The final expression of their views on claims and accounts which are to be settled and adjusted in the Department of the Treasury (Rev. Stats., 236) and their action thereon constitute not an opinion merely, but a decision. They cannot abdicate their powers or disregard their duties, or delegate to others the right to judge, act, or think for them; hence, no opinion of any other officer can be prescribed by any executive or judicial authority for the guidance or control of accounting officers, in matters within their jurisdiction. (*Nichols vs. United States*, 7 Wall., 122.) In all matters, however, over which any other officer has an exclusive jurisdiction or full discretionary authority, the opinion of such officer in respect of such matters may be adopted and promulgated by the head of the proper Department, under his general power to make

regulations. Where an officer exercises the functions and performs the duties of an office in respect of a matter intrusted to his judgment, discretion, and direction, his opinion and decision may be conclusive on the accounting officers.

In respect of the question now to be considered, the sections of the Revised Statutes are given above in numerical order, and not in the order of the dates of the acts from which they are taken. Until the passage of the act of June 6, 1872, (now section 3228 of the Revised Statutes,) there was no limitation of time prescribed by law in respect of refunding internal-revenue taxes. At that date refunds of such taxes were authorized by two statutes—the acts of June 30, 1864, (Rev. Stats., 3426,) and July 13, 1866, (Rev. Stats., 3220.) The internal-revenue act of June 30, 1864, provided for refunds in two separate sections, namely, in section 44, substantially as in section 3228 of the Revised Statutes; and in section 161, substantially as in section 3426 of the Revised Statutes. (13 Stats., 239, 294.) The two classes of refunds were thus authorized and provided for by separate sections of the same act. It is pertinent, therefore, to inquire whether the subsequent limitation in respect of refunding taxes which was made by the act of June 6, 1872, sec. 44, (17 Stats., 257,) was intended to apply to both classes of refunds.

The first internal-revenue act of the recent war-series is that of July 1, 1862, (12 Stats., 432.) The title of this act describes it as “An act to provide internal revenue * * *.” The first section creates the office of Commissioner of Internal Revenue, “for the purpose of superintending the collection of [1] internal duties, [2] stamp duties, [3] licenses, or [4] taxes imposed by this act, or which may be hereafter imposed * * *.” Section 2 authorizes the President to prescribe collection districts, “for the purpose of assessing, levying, and collecting [therein] the duties or taxes hereinafter prescribed by this act * * *.” The act of June 30, 1864, (13 Stats., 223,) uses, in respect of internal taxes, substantially the words of the first section of the act of 1862.

There are at least three sources from which to ascertain the meaning of the words “internal tax” as employed in the act of June 6, 1872, (Rev. Stats., 3228,) to wit: (1) The several statutes on the subject; (2) popular usage—the oral meaning, as well as that given in standard works on political economy; and (3) the definitions of legal and other lexicographers. These all lead to the conclusion that the moneys derived from the kind of stamps now under consideration are “internal taxes.” The words “internal taxes,” in their most comprehensive sense, include taxes collected in all forms under the statutes which are

known as "internal-revenue laws," as distinguished from customs-duties and the public revenue derived from other sources, such as, *e. g.*, postal revenue and receipts of sales of the public lands. (Cooley on Taxation, 1, 22, 23, 309, 320; Burroughs on Taxation, 596, 628, 638.)

There are considerations which favor the theory that the limitation of two years prescribed in section 3228 of the Revised Statutes in respect of "any internal tax" applies as well to refunds for the "stamps" mentioned in section 3426 as to refunds under section 3220; and there are, on the other hand, considerations against that theory which have been forcibly presented by the Attorney-General in the opinion of January 16, 1878. (15 Op., 426.)

Among the considerations in favor of applying the limitation to stamp-refunds are these:

1. The language of the statute of limitation is general in its terms. Congress, in imposing a limitation of two years, employed the words "all taxes * * * in any manner wrongfully collected." Regarding the word "taxes" as a generic term, it must be construed as including all kinds of internal taxes, and therefore as including stamp-taxes. The words "in any manner wrongfully collected" are also very general; they are sufficiently broad to include—employing the words of section 3426, the same used in the Commissioner's allowance of the claim—stamps "unnecessarily used."

This construction is sustained by the maxims *Generalia verba sunt generaliter intelligenda*, and *Generalis regula generaliter est intelligenda*. The opinion of the Attorney-General of January 7, 1875, was based, no doubt, upon the applicability of these maxims of construction to the question before him.

2. Statutes of limitation are statutes of repose, and, if not to be liberally construed, they are, by modern usage at least, to be looked upon with favor.

3. The reason for the enactment of the limitation applies to claims arising under section 3426, as well as to claims arising under section 3220. Hence, as the limiting words of section 3228 can be fairly considered as applying to both sections, they should be so construed, in order to meet the reasonably presumed intention of Congress. It is a principle of indirect taxation that the tax falls upon the consumer; hence, in all probability, the people who purchased the articles on which the stamps were affixed by the claimant paid in effect the stamp taxes in question. In such case a refund to the claimant would be practically a gratuity, and the claim would not present strong merit or equity. While considerations of this character cannot be allowed to

repeal, by means of construction, a law which clearly authorizes a refund to the dealer in the articles erroneously stamped, they are, nevertheless, sufficiently strong to justify the officers of the Government in holding claimants to a strict compliance with the provisions of the law in respect of refunding such indirect taxes as are levied under the internal-revenue system.

Some of the reasons which seem to be suggested in the opinion of the Attorney-General, or which otherwise present themselves, as showing that the two years' limitation of section 3228 applies only to claims made under section 3220, may be stated :

Although the expression "all taxes * * * in any manner wrongfully collected" is so general in terms that, for many purposes, it would cover "stamps" "unnecessarily used," yet there is a rule of interpretation and of construction that general words or expressions in a statute may be restrained or limited in their application by recitals, by the subject-matter, by the position of the persons to whom they relate, by subsequent words, by the object for which they are used, and other like evidences of the purpose of the legislature. *Verba generalia restringuntur ad habilitatem rei vel persone.* (Broom. Leg. Max., 646.)

There are several evidences of the purpose of Congress to apply the two-years' limitation only to claims made under under section 3220.

(1.) In the opinion of January 16, 1878, (15 Op., 429,) the Attorney-General says:

"As the claims mentioned in section 3228 agree in description with those mentioned in section 3220, and are wholly contained in the latter section, and as it is manifest that these claims are all essentially different from those mentioned in section 3426, I deduce therefrom this conclusion: that the limitation in section 3228 is intended to apply to the claims described in section 3220, and not to the claims described in section 3462."

The coincidence in language between sections 3220 and 3228 is certainly a strong indication that Congress, in enacting the limitation of the latter, had in view only claims under the former, and hence intended to limit the ordinary meaning of the general words "any internal tax."

(2.) The legislative construction of section 3426, made by the act of March 1, 1879, (20 Stats., 349,) supplements the somewhat limited but similar construction referred to in 15 Opinions, 429, made by the act of July 12, 1876, (19 Stats., 88.) These considerations, though not conclusive, are entitled to some weight. The statutes of 1876 and 1879 are not, in terms or by inference, amendatory of section 3228, but are expressly applicable to and amendatory of section 3426; and they seem to have been enacted because Congress understood the prior law

as not making any limitation in respect of the stamp-refunds. It treats them as a class distinct from those covered by sections 3220 and 3228.

(3.) Congress has recognized and provided by "permanent annual appropriations," indefinite in amounts, for refunds of money in respect of taxes erroneously paid, as constituting two distinct classes, namely: (a) where no stamps are required to be used; (b) where stamps are required to be used. The appropriation provision in respect of internal taxes illegally collected was taken from the act of June 30, 1864, sec. 44, (13 Stats., 239,) while that in respect of stamp-refunding was taken from section 161 of that act as amended by the act of June 6, 1872, sec. 41, (17 Stats., 257.) Both provisions were construed as carrying with them appropriations for payments of the amounts to be refunded, and hence the provisions in section 3689 of the Revised Statutes, as follow:

(a.) "Refunding taxes illegally collected, (internal revenue:) To refund and pay back duties erroneously or illegally assessed or collected under the internal-revenue laws.

(b.) "Redemption of stamps, (internal revenue:) Of such sum of money as may be necessary to repay the amount or value paid for internal-revenue stamps which may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or which through mistake may have been improperly or unnecessarily used."

The coincidence in language between sections 3220, 3228, and in the clause above, from section 3689, as to "refunding taxes illegally collected," shows that their provisions all belong to one class, while the coincidence in language between section 3426 and that part of section 3689 relating to "redemption of stamps" shows that their provisions belong to another and distinct class of liabilities.

(4.) This view has, in practice, been adopted by the First Comptrollers since January 16, 1878, and their decisions in similar cases are conclusive as to such cases, and should be followed as authoritative now, unless there be cogent and satisfactory reasons to the contrary. The rulings of the First Comptroller as to matters within his jurisdiction have generally more than persuasive weight.

Upon the reasons suggested in favor of the respective opposing opinions of the Attorneys-General on the question whether section 3228 should be construed as in *pari materia* with section 3220 only, and in view of the usage heretofore prevailing, which gave it that limitation, it should now be held in respect of claims under section 3426 that the two-years' limitation of section 3228 does not apply to them. It is only in view of this usage that the conclusion is reached, for it might well be insisted on that the "stamps" in question are, for the purposes now being considered, to be regarded (1) as "any [an]

internal tax," and (2) as a tax which was, therefore, in fact "erroneously or illegally assessed or collected"—a tax which was "in any [a] manner wrongfully collected;" and hence it would follow that the claimant could not, by the mere verbiage employed in making the claim, escape the two-years' limitation imposed by section 3228 on claims made under section 3426. He could not by employing the mere words of section 3426, and calling the claim one for "stamps" "unnecessarily used," make it, without encountering the conditions of sections 3220 and 3228, a claim for anything else than "taxes erroneously or illegally assessed or collected."

The question is not as to what the transaction is *called*, but as to what it *is* in fact and legal effect. (Great Falls case, 16 Ct. Cls., 160.) That the stamps were "unnecessarily used" within the meaning of these words in section 3426 is certain. Internal-revenue stamps are "unnecessarily used" when the statute does not require them to be used. When such stamps are not necessarily used they are unnecessarily used. A legal necessity is not shown in this case by the fact that the collector, under the ruling of the Commissioner of Internal Revenue, required the stamps to be used by the claimant, and that he used them in order to escape a prosecution.

The question in respect of the statute of limitation is narrowed down to this: Are the stamps "any internal tax" within the meaning of sections 3220 and 3228? It must be held that they are not.

1. The words employed in these sections indicate that they relate only to money assessments. This meaning is shown by the expressions "taxes erroneously or illegally assessed," "taxes * * * unjustly assessed," "taxes collected," and others tending to the same result. An examination of the original internal-revenue act of July 1, 1862, (12 Stats., 432,) and the act, mainly supplemental, of June 30, 1864, (13 Stats., 223,) will show that money-taxes were "assessed" on lists of property in the hands of assessors. Thus, in section 13 of the act of 1862, it is said that the assessor "shall proceed in making the assessment of the tax upon the list [of property subject to tax] so by him received." So income taxes were assessed. (Sec. 92.) These taxes might be "collected" by distraint. (Sec. 19.) The same act required packages, &c., of medicinal preparations, and certain instruments of writing, to be "duly stamped" with "an adhesive stamp" for "denoting the duty hereby imposed." The latter taxes are also called "stamp duties." (Secs. 95, 106, 114.) The affixing of the stamps was enforced by penal prosecutions in court, and by judicial forfeiture of certain articles subject to duty. (Secs. 95, 114.) Stamp duties were neither "assessed" nor "collected"

within the meaning of these words as found in the statutes. Stamps were sold by officers to purchasers for use. Many other illustrations might be cited to show the distinction between what the act itself describes as [1] "internal duties, [2] stamp duties, [3] licenses, or [4] taxes, imposed by this act." (Sec. 1, act June 30, 1864; 13 Stats., 223.) Here, then, are two general classes of taxes: (1) money taxes "assessed," and (2) stamp duties not "assessed" or "collected."

2. This distinction between (1) money taxes "assessed" or otherwise required to be paid and (2) stamp duties was observed in the mode of refunding when either were improperly exacted. As to money taxes, it is provided by section 44 of the act of June 30, 1864, (13 Stats., 239:)

"That the commissioner of internal revenue, subject to regulations prescribed by the Secretary of the Treasury, * * * is * * * authorized * * * to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and all duties that shall appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, * * *; and all sums of money which the commissioner is authorized to pay by virtue of this section shall be paid by drafts drawn on collectors of internal revenue."

This mode of refunding was repealed by the effect of the act of March 3, 1865, (13 Stats., 483, sec. 3.) The Commissioner can no longer remit, refund, and pay back taxes. This is now done by the accounting officers, under section 236 of the Revised Statutes, on accounts stated; but this change of mode does not change the fact of the distinction referred to. As to stamp duties, it was provided by section 161 of the act of June 30, 1864, (13 Stats., 294,) that "the commissioner of internal revenue may, from time to time, make regulations * * * for the allowance of * * * stamps * * * unnecessarily used * * *; and such allowance shall be made either by giving other stamps * * * or by repaying the amount, * * * deducting * * * five per centum." Such refunds for stamps differed from refunds of money taxes in these particulars: (1.) As to money, regulations were to be prescribed by the Secretary; as to stamps, by the Commissioner. (2.) As to money, the Commissioner paid by draft; as to stamps, payment was made in kind or in money, with no authority to draw any draft, and hence only after passing through the hands of the accounting officers. (3.) As to money, full payment was made; as to stamps, a deduction of five per cent. was made when paid in money.

3. If it be said that sections 3220 and 3228 apply to "taxes * * * in any manner wrongfully collected," and that these words are sufficiently general to include stamps, there are sufficient answers to this.

a. It has been shown that general words may by construction be found to have been used in a limited sense.

b. These particular words are found in connection with others clearly applying to money-taxes, and, upon the maxim *Noscitur à sociis*, they are to be construed as applying to the same kind of taxes. This view is strengthened by the fact that section 3426 does clearly apply only to stamps, while sections 3220 and 3228 do certainly apply to money taxes. And, in view of these distinct provisions, it is not at all probable that Congress, while making separate and specific provisions as to each class, failed to make all the provision intended for it, or designed to intermingle the classes and remedies; and it is especially improbable that Congress effected such intermingling by ambiguous or doubtful words.

It is, therefore, decided as to the stamps now in question that the "internal tax" mentioned in section 3228 is a tax payable in money, and does not include stamp duties or stamp taxes. It follows that a claim for a refund of proprietary stamps "unnecessarily used" is not barred by the two-years' limitation of section 3228. The purpose of Congress seems to have been to provide for this as a case in which a party has used stamps when he should not have incurred the expense thereof. It is not intended to decide any question as to any other class of stamps.

In order to avoid misapprehension, one further explanation may be proper. Section 3426 does not in exact terms declare that there shall be a refund for stamps which may be "erroneously or illegally" required by revenue officers to be affixed. A claim for such refund, however, is sufficiently included by the expression in this section: "where the rates or duties represented thereby [*i. e.*, by stamps] have been paid in error." The provision is remedial, and to be construed with reasonable liberality.

This decision is not, in any sense, placed on the ground that the approval of the claim by the Commissioner of Internal Revenue is conclusive on the First Comptroller.

The claim in this case will be certified for report to the Speaker of the House of Representatives, under the act of June 14, 1878, (20 Stats. 130.)

TREASURY DEPARTMENT,

First Comptroller's Office, November 11, 1881.

The "regulations" made by the Secretary of the Treasury (*ante*, 493,) in respect to the refunding of internal taxes are as follow :

By the 41th section of the act of Congress to provide internal revenue, &c., approved June 30, 1864, a duty is devolved upon the Secretary of the Treasury to prescribe certain regulations, whereby the Commissioner of Internal Revenue is authorized, on appeal to him, to remit, refund, and pay back all duties erroneously

or illegally assessed or collected, and all duties that shall appear to be unjustly assessed, or excessive in amount, or in any manner wrongfully collected. The Commissioner of Internal Revenue will therefore consider the following as the regulations established for conducting this branch of the public business:

1st. As evidence in support of the claimant's appeal, there must be required the assessor's statement of the tax assessed, and the nature of the tax, with the date of the assessor's list of taxes on which the tax appears, and whether it is on an annual, monthly, or special list of taxes. The collector must be required to state the amount of the assessed tax committed to him to collect, and the amount he actually collected.

2d. In the examination of the merits of the appeal, the Commissioner of Internal Revenue must require evidence of the character of the tax—that is, whether it was assessed on income, manufactures, &c.—that the nature of the tax may accurately appear; and the ground should be stated upon which the tax is paid back, whether because it was erroneously or illegally assessed, or otherwise, carefully distinguishing between the remission of a tax or the refunding of a tax.

3d. When the appeal has been fully heard and examined, the Commissioner of Internal Revenue must put into the case a certificate of his decision or judgment, with the amount, in writing, which should be paid back.

4th. A proper book or docket must be carefully kept in the office of the Commissioner of Internal Revenue, in which should be entered, under its proper date, the name of the claimant, with the amount of the tax which is the subject of appeal, and the final decision of the said Commissioner.

5th. When, from time to time, and as the Commissioner of Internal Revenue, in the course of his public duties, shall complete his examination and give his judgment on these appeal cases, *he will transmit a weekly list of them to the First Comptroller of the Treasury, together with all the vouchers, upon which, as evidence, he rests his decision, as a matter of account, giving upon the list the proper date, the name of the claimant, and the amount found due each claimant.*

6th. *The Comptroller of the Treasury, upon receiving these lists and vouchers from the Commissioner of Internal Revenue, will cause an account to be stated, and the amount to be refunded certified to the Register of the Treasury, who will transmit a certified copy thereof to the Secretary of the Treasury, upon which a warrant on the Treasurer will be issued in the usual manner. The drafts of the Treasurer, unless otherwise directed, shall be transmitted to the Commissioner of Internal Revenue, to be by him remitted, either directly to the proper parties or through the collectors of the several districts, as the said Commissioner may deem best.*

7th. When the case of an appeal involves an amount exceeding two hundred and fifty dollars, and before it is finally decided, the Commissioner of Internal Revenue will transmit the case, with the evidence in support of it, to the Secretary of the Treasury, for his consideration and advisement.

H. McCULLOCH,
Secretary of the Treasury.

TREASURY DEPARTMENT, *January 12, 1866.*

NOTE BY THE COMPTROLLER.—The offices of assessor and assistant assessor of internal revenue were abolished July 1, 1873, and the duties thereof were imposed upon the collectors of internal revenue and their deputies. (Act of December 24, 1872, 17 Stats., 401.) Some assessments are to be made by the Commissioner of Internal Revenue, and not by collectors. (*Id.*, 402.) The act of 1872 does not materially affect the above regulations.

IN THE MATTER OF THE RIGHT OF EMPLOYÉS IN THE
GOVERNMENT PRINTING OFFICE TO COMPENSATION
DURING SUSPENSION OF WORK AS A MARK OF RESPECT
TO THE MEMORY OF THE LATE PRESIDENT GARFIELD.
—PRINTERS' CASE.

1. The Public Printer has authority to employ, at such rates of wages as he may deem for the interest of the Government and just to the persons employed, such proof-readers, compositors, pressmen, binders, laborers, and other hands as may be absolutely necessary for the execution of the orders for public printing and binding authorized by law; but he is forbidden to pay for composition any greater price than fifty cents per thousand ems, or, for time-work, more than forty cents per hour to printers and book-binders.
2. The employés of the Government Printing Office are allowed pay for the legal holidays occurring on the 1st of January, the 22d of February, the 4th of July, and the 25th of December, and for such day as may be designated by the President of the United States as a day of public fast or thanksgiving; and it is the declared sense of Congress that when the Government Printing Office is closed on "Decoration Day," pursuant to the proclamation of the President, and the employés of the other Executive Departments in Washington, likewise closed, are paid for that day, the employés of the Government Printing Office are equally entitled to payment for that day.
3. The employment by the Public Printer of the proof-readers, compositors, pressmen, binders, laborers, and other hands composing the working force of his office, constitutes a contract for *continuous* service, which is to be interrupted only on such occasions as may be expressly agreed upon or implied from usage, or arising from the necessities of the public service or other controlling circumstance.
4. The suspension of work at the Government Printing Office from noon on September 21 to the close of working-hours on September 24, 1882, as a mark of respect for the memory of the late President Garfield, was not required by the necessities of the public service, or by any other controlling circumstance. The employés are therefore entitled to pay during that time.
5. The employés at the Government Printing Office did not find, and could not have found, employment in the city of Washington or vicinity during the suspension of work; hence, they come within the rule of contract law which awards a right of compensation for the time thus lost by them. The fact that they were not dismissed or furloughed makes such right conclusive on the Government.
6. There is no statutory provision limiting the employés in the Government Printing Office to compensation only for "the time during which they may be actually employed."
7. The Public Printer can make such contracts only, and in such form, as the statute may authorize, and all persons are bound at their peril to know the extent of his authority. If, under color of authority, he make an unauthorized agreement, the Government is not liable thereon. In this respect a public agent differs from a general private agent.
8. The statute prescribes the *rate of compensation* for some of the employés of the Government Printing Office, but it does not in terms or by any reasonable construction say that there shall be no contract for continuous or fixed periods

of service. The authority to employ is *general in terms*, and it is to be understood as giving a general authority, with no limitations except those enumerated or properly implied.

9. If the authority of the Public Printer were so limited that he could make no contract for *continuous service*, no contract for *continuous time*, but only for *work actually performed*, without privilege of continuity, then a suspension of the work, even without cause, would violate no contract, and so no right to compensation for lost time could arise.
10. It is a *general* principle of law, as it is of reason and justice, that when the Government, by its agent, enters into an authorized contract with a private citizen to pay him compensation for his services, it accepts the rules of law applicable to public or private corporations or individual persons as to the character and extent of its liability.
11. Congress has recognized the obligation of the Government to meet its contract liabilities by giving the Court of Claims jurisdiction to award *compensation and damages* to private suitors in actions for "all claims founded upon any * * * contract, expressed or implied, with the Government of the United States."
12. It is well settled that if a private person contracts for the services of an employé for a fixed period, and without legal justification *dismisses* him from the service, and thus terminates the contract, the employer is liable to pay the dismissed employé the contract rate during the unexpired period of service, less such sum as the employé might, by reasonable diligence, have earned—as it would seem, generally—"in the same region," and in "business of the same character."
13. Where an employé "is wrongfully *dismissed* during a quarter or other definite term, he may, after the quarter or term ends, recover for the whole in an action, not for work and labor, but for *preventing him* from doing his work." (2 Parsons, Contracts, 6th ed., 41.) The amount to be recovered in such case is the pecuniary loss sustained.
14. When an employé is *actually dismissed* without sufficient cause, and has earned wages elsewhere, or by reasonable diligence might have done so, in business of the same character, the remuneration to which he would otherwise be entitled is to be reduced by the amount he earned, or might have so earned. The burden of showing that wages were or might have been earned is on the employer.
15. Employés entering upon service under the Public Printer are chargeable with a knowledge of the law that the Public Printer may do whatever the public interest or the necessities of the service may require, even though such interest or necessities may for a time suspend the opportunity for service and the right to compensation on the part of the employés under him.
16. But when there is no *express* contract reserving a right to the Public Printer to suspend work in other cases and for other reasons, and there is no usage from which employés may expect the exercise of such right, any other unforeseen and not absolutely necessary suspension would violate their understanding of the nature of their employment. Whatever reasonable men are led to expect from the character of their employment and the general usages affecting it, is an implied part of the contract of employment.
17. There was between the Public Printer and the employés under him whose work was suspended a fairly implied agreement that each employé should have *continuous employment*, subject to no *interruptions* other than those referred to as

- being fixed by *usage* or authorized by the public interest, the necessities of the service, or other controlling circumstance affording a reasonable justification therefor, as, *e. g.*, pestilence, conflagration, riot, or other similar cause.
18. The suspension of the work in the Government Printing Office on the 21st of September was *unusual* and *unexpected* by the employés, and hence it was not such a suspension as was contemplated in the contract of employment. It was neither a *legal necessity* nor in pursuance of any authority reserved in the contract of employment or authorized by usage or other controlling circumstance. It resulted in depriving the employés of a right to earn compensation to which, by the contract and the law, they were entitled.
 19. On the part of those persons employed in the Government Printing Office in continuous service by the day, hour, or fixed price for piece-work, there is no right to compensation for the day fixed by the President's proclamation "as a day of humiliation and mourning;" namely, the 26th day of September, 1882.
 20. The proclamation, though it did not have the force of either common or statutory law, was justified by "a decent respect to the opinions of mankind." It created a holiday in the solemn sense of the word. It was such a *controlling element* that the Public Printer might, in reason and in law, regard it as a command, or at least as a justification, for suspending work during that day.
 21. The suspension of the work for that day having been made with the express assent of the Public Printer and the implied assent of the employés, the latter can be paid no compensation for that day unless by *force of statute, contract, or usage*. There is no statute which gives a right to such compensation. The contract of employment does not authorize the compensation, and in the very nature of the case there can be no usage governing the matter.
 22. Accounting officers of the Treasury have no jurisdiction over claims for unliquidated damages sounding in tort; but, excepting uncertain damages resting in opinion, and not accurately ascertainable by evidence and computation, the proper accounting officers have, under sections 236, 269, 277, and 317 of the Revised Statutes, authority to allow claims for damages not sounding in tort when there is an appropriation available.
 23. *Unliquidated* damages are those which rest, in a large measure, on opinion, or they "depend upon the peculiar circumstances of each particular case, which cannot be ascertained by calculation or computation, as [1] damage for not using a farm in a workmanlike manner, [2] for not building a house in a good and sufficiently strong manner, [3] on warranty in the sale of a horse, [4] for not skillfully amputating a limb, and [5] other cases of a like character."
 24. While the statutes which give the First Auditor and the First Comptroller jurisdiction do not extend to claims for unliquidated damages sounding in tort, nor to uncertain damages resting in opinion and not ascertainable to strict accuracy by evidence and computation, they clearly *do* give jurisdiction of claims for damages not sounding in tort, the just amount of which may be ascertainable from the circumstances of the case.
 25. In the courts three remedies are open to an employé rendering service at fixed wages who is wrongfully dismissed or wrongfully prevented from performing his contract, either one of which he may pursue, to wit: (1) Treat the contract of employment as *rescinded*, and sue in debt or assumpsit for the wages due; (2) at the end of the contract period of service, or time when wages become due, sue and recover damages; (3) without waiting until the expiration of the con-

tract period, immediately sue for any *special injury* sustained in consequence of a *breach* of the contract in being denied the privilege of performance.

26. The claim of the employés in the Government Printing Office is within the jurisdiction of the accounting officers. It is based on a continuous contract of service, and they were not dismissed from employment. Service was interrupted without their consent. They were, however, expected to be (as in fact they were) in readiness to return to work at any time, notwithstanding the suspension; and, in the mean time, so far as appears, they were not, and could not have been, employed here at their respective occupations or trades.
27. When an employé under a contract for continuous service is, without his consent, temporarily and without sufficient excuse interrupted in his work by his employer, the contract of service remains in force. The employé is required by his contract to be in readiness for duty on call; he is, therefore, entitled during such interruption to payment at the contract rate of wages. His claim in such case is not for uncertain, unliquidated damages, but for the contract compensation.
28. If the employer by contract *reserve a right to suspend work or to terminate a contract when any piece of work is finished*, he may do so without incurring a liability in damages. So, if a party agree to furnish materials and make a given number of articles, and his contract is terminated and he does not furnish all the materials, he is not entitled to payment for the materials not furnished.
29. A printer paid by the month on continuous service upon an agreed compensation of fifty cents per thousand ems occupies no such position. The mode of ascertaining the rate of his compensation does not, in the absence of a special agreement or usage, abridge his right to continuous employment. By every principle of reason and justice he is entitled to the wages he might have earned.
30. The act of the Public Printer in suspending work on September 21st was not a tort. It is well settled that "the Government is not responsible for the malfeasance, or wrongs, or neglects, or omissions of duty of the subordinate officers or agents employed in the public service." This rule exempts the Government from liability in those cases in which, as between private persons, relief would be sought in courts in actions of tort, or *ex delicto*. It has no application when the action is *ex contractu*.
31. If the employés who were denied the privilege of rendering service consented to the suspension of work, they would have no claim to any remuneration. *Volenti fit non injuria*. It is not alleged that they were consulted, or asked to consent; and in fact they did not consent. If any employé was *unable* during the period of suspension to render service, he suffered no damage by the suspension, and can be allowed no remuneration.
32. Subject to the limitations and qualifications stated, the right of the employés in the Government Printing Office to remuneration for the loss they respectively sustained by the suspension of the work on the 21st of September is well supported by law. The current appropriation for public printing is applicable to the payment of *wages* to which those employés are entitled by contract.
33. Payment by the Public Printer in accordance with this conclusion, on rolls by him certified, will be deemed valid, and such rolls will be allowed as vouchers in his accounts as disbursing officer. It is not required that the certificate shall show the performance of work, but only the amount to which each employé is entitled in accordance with this opinion.

James A. Garfield, President of the United States, died at Elberon, New Jersey, on the evening of Monday, September 19, 1881. His remains were brought to Washington, about 4.30 P. M., on Wednesday, September 21st, and lay in state in the rotunda of the Capitol from that time until about 5 P. M., on Friday, September 23d, when they were removed for interment at Cleveland, Ohio.

On the morning of Wednesday, September 21st, the following notice was posted in the Government Printing Office :

NOTICE.

OFFICE OF PUBLIC PRINTER,
Washington, September 21, 1881.

The Government Printing Office will be closed from noon to-day until Tuesday morning next.

As the Public Printer cannot pay, under existing law, for the time the office is closed, he will submit the matter to Congress and ask that he be authorized to do so.

JOHN D. DEFREES,
Public Printer.

The office was closed accordingly; and it does not appear that this was done upon the application or with the assent of the subordinate officers or employés.

September 22d the President issued a proclamation designating "Monday, the 26th day of September," as the day on which "the remains of our honored and beloved dead [President] will be consigned to their last resting-place on earth;" requesting it "to be observed throughout the United States as a day of humiliation and mourning;" and recommending "all the people to assemble on that day in their respective places of Divine worship, there to render alike their tribute of sorrowful submission to the will of Almighty God, and of reverence and love for the memory and character of our late Chief Magistrate."

September 30, 1881, the Public Printer addressed a letter to the First Comptroller, submitting the question "whether or not the employés can be paid for the entire time the office was closed on account of the death of the late President, and whether the pay-rolls therefor will be recognized by the Treasury Department."

OPINION BY WILLIAM LAWRENCE, *First Comptroller:*

There was an abundance of work to be done at the Government Printing Office pending the stoppage of work as a mark of respect for the memory of the late President; and it does not appear that the employés did, or could, secure employment elsewhere during the period of suspended work, or that any usage existed in that office as to pay in

such case. The employes have been paid for the work performed prior to and since the period of suspension.

Among the powers of the Public Printer, as prescribed in the Revised Statutes, are these :

"SEC. 3758. * * * to take charge of and manage the Government Printing Office * * *."

"SEC. 3760. * * * to cause the work to be promptly executed; to superintend all printing and binding done at the Government Printing Office * * *."

"SEC. 3763. The Congressional Printer may employ, at such rates of wages as he may deem for the interest of the Government and just to the persons employed, such proof-readers, compositors, pressmen, binders, laborers, and other hands, as may be necessary for the execution of the orders for public printing and binding authorized by law; but he shall not, at any time, employ in the office more hands than the absolute necessities of the public work may require."

The act of February 16, 1877, (19 Stats., 231,) provides that—

"The Public Printer shall pay no greater price for composition than fifty cents per thousand ems; and forty cents per hour for time-work to printers and bookbinders."

The Revised Statutes provide :

"SEC. 3738. Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States."

The "joint resolution" of April 16, 1880, (21 Stats., 304,) "providing for payment of wages to employees in the Government Printing Office for legal holidays," declares—

"That the employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving: *Provided*, That the said employees shall be paid for these holidays only when the employees of the other government departments shall be so paid: *And provided further*, That nothing herein contained shall authorize any additional payment to such employees as receive annual salaries."

The Public Printer has authority to appoint a foreman of printing and a foreman of binding and certain clerks, with annual salaries, respectively, prescribed in amount by statute. (Rev. Stats., 3761, 3762; Act of June 20, 1878, 20 Stats., 206.)

He is a disbursing officer, the Revised Statutes providing that—

"SEC. 3816. There shall be advanced to the Congressional Printer, from time to time, as the public service may require it, and under such rules as the Secretary of the Treasury may prescribe, a sum of money not exceeding, at any time, two-thirds of the penalty of his bond, to enable him to pay for work and material.

"SEC. 3817. The Congressional Printer shall settle the account of his receipts and disbursements in the manner required of other disbursing officers."

I.—*The employment of the persons referred to in the letter of the Public Printer constituted a contract.*

The Public Printer is an officer whose authority is prescribed by statute. He can make such contracts only, and in such form, as the statute may authorize, and all persons are bound at their peril to know the extent of his authority. (*Lee vs. Munroe*, 7 Cranch, 366; *Curtis's case*, 2 Ct. Cls., 144; *Filor vs. United States*, 9 Wall., 45; *Smoot's case*, 15 Wall., 37, 50; 7 Op. Att.-Gen., 88.) If, under color of authority, he make an unauthorized agreement, the Government is not liable thereon. In this respect a public agent differs from a general private agent. (*Gibbons vs. United States*, 8 Wall., 269.) The authority under which an agent acts is to be construed with reasonable strictness. (*Clift's case*, *ante*, 187; *Sedgwick*, Stat. and Const. L., 2d ed., 81, 309, 330; *Agent vs. Lathrop*, 1 Mich., 438.)

If the authority of the Public Printer were so limited that he could make no contract for *continuous service*, no contract for *continuous time*, but only for *work actually performed*, without privilege of continuity, then a suspension of the work, even without cause, would violate no contract, and so no right to compensation for lost time could arise. It is necessary, therefore, to inquire: Did the statute give the Public Printer authority to contract *only* for services to be *actually rendered*? or could he agree to give *continuous employment*? The statute says his authority is to "*employ*" such persons as may be necessary, and "*at such rates of wages as he may deem for the interest of the Government and just to the persons employed*;" but a later statute—the *proviso* in the act of February 16, 1877—says that he "*shall pay no greater price for composition than fifty cents per thousand ems, and forty cents per hour for time-work to printers and bookbinders*." Clearly, upon this language, there can be no question as to the existence of authority to make a contract for continuous service with any employes except *compositors, printers, and bookbinders*; and as to these employes the rules of construction and every reason of policy and justice lead to the conclusion that the Public Printer has authority to enter into contract with them for continuous service. It is not probable that Congress intended to single these employes out from all other employes and put them on a different footing as to time. *Exceptions*, which might operate to make invidious distinctions, can only arise from language which with *reasonable clearness* creates them. The statutes cited are to be reasonably construed in view of recognized principles of law and the usages in re-

spect of public employment. When a public officer has authority to purchase goods or contract for the services of employés, a contract may be *implied* from circumstances. (*Salomon vs. United States*, 19 Wall., 17; *Gibbons vs. United States*, 8 Wall., 269; *King's case*, 1 Ct. Cls., 38.)

When a power is given by statute to a public officer, there is an implied authority to employ the necessary and *usual means* of executing it with effect. (*The Floyd Acceptances*, 7 Wall., 680; *Story, Agency*, 58.) This rule, however, may be, and sometimes is, modified by express provision of law.

It is well known that in private printing establishments compositors and printers are frequently employed by contract for *continuous* or fixed periods of service, with an agreed rate of compensation per thousand ems set or per hour of work, and that similar usages prevail in binderies.

The statute prescribes the *rate of compensation* for some of the employés in the Government Printing Office, but it does not in terms or by any reasonable construction say that there shall be no contract for continuous or fixed periods of service. Nothing is said as to the periods of service. The authority to employ is *general in terms*—"the Congressional Printer may employ." General words in a power are to be understood as giving a general authority, with no limitations except those enumerated or properly implied. *Generalia verba sunt generaliter intelligenda. Generalis regula generaliter est intelligenda.* There is a limitation as to the *rate* of wages, but not as to the *time* for which employment may be given. There is a limitation as to the number of employés—not "more hands than the absolute necessities of the public work may require." Since Congress has made limitations affecting in these two particulars the contract of employment, an inference very naturally arises that no limitation in respect of continuous employment was intended. *Expressio unius est exclusio alterius.* It would manifestly be a very strict construction of the statute to hold that it gives no authority to make a contract for continuous service. Clearly the statute authorizes an employment for labor by the month at a monthly compensation, and of compositors by the day, week, or month, with compensation of 50 cents per 1,000 ems during the month. The limitation is on the rate of pay, not on the contract time of service.

The Public Printer, then, had authority to make a contract for continuous service, to be interrupted only on such occasions as may be expressly agreed upon or implied from usage, or arising from the necessities of the public service or other controlling circumstance. The Public Printer admits that the contract of employment with the persons referred to in his letter was of this nature; hence, the employés were in

the public service during the suspension of work. This being the case, it now becomes pertinent to consider the question as to whether these employés can be paid for the time lost by them during the suspension.

II.—*The law furnishes an adequate remedy for this case.*

1. It is a *general* principle of law, as it is of reason and justice, but subject to some exceptions not now material, that when the Government, by its agent, enters into an authorized contract with a private citizen to pay him compensation for his services, it accepts the rules of law applicable to public corporations or individual persons as to the character and extent of its liability.

Thus the Supreme Court has said: "When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility of individuals who are parties to such instruments." (*United States vs. Bank of the Metropolis*, 15 Pet., 377, 392; *Texas vs. Hardenberg*, 10 Wall., 68; *Vermilye vs. Adams Exp. Co.*, 21 Wall., 138; *United States vs. Barker*, 12 Wheat., 559; *United States vs. Bank of U. S.*, 5 How., 382; *The Floyd Acceptances*, 7 Wall., 666; *United States vs. Smith*, 94 U. S., 215; 2 Op. Att.-Gen., 505; 4 Op., 90, 295, 299; 6 Op., 520; 8 Op., 1.) It is, however, a general rule that unauthorized acts of officers do not bind the Government.

Congress has recognized the obligation of the Government to meet its contract liabilities by giving the Court of Claims jurisdiction to award *compensation* and *damages* to private suitors in actions for "all claims founded upon any * * * contract, expressed or implied, with the Government of the United States." (Rev. Stats., 1059.) The extent of this jurisdiction is illustrated in many cases. (*Boston Bank cases*, 10 Ct. Cls., 520; *Burns's case*, 4 Ct. Cls., 113; s. c., *United States vs. Burns*, 12 Wall., 246; *Sweeney's case*, 5 Ct. Cls., 285; *Patton's case*, 7 Ct. Cls., 362; *Clyde vs. United States*, 13 Wall., 38.)

2. It is well settled that if a private person contracts for the services of an employé for a fixed period, and without legal justification *dismisses* him from the service, and thus terminates the contract, the employer is liable to pay the dismissed employé the contract rate during the unexpired period of service, less such sum as the employé might, by reasonable diligence, have earned—as it would seem, generally—"in the same region," and in "business of the same character." (*Sedgwick on Damages*, 6th ed., [224,] 267, [352,] 417, n. (2); *Rogers vs. Parham*, 8 Cobb, Ga., 190; *Emerson vs. Howland*, 1 Mason, C. C., 53; *Hunt vs. Colburn*, *Sprague's Admiralty Decisions*, 215; *Whitaker vs. Sandifer*, 1 Duvall, Ky., 261; *Wright vs. Falkner*, 1 Ala. Sel. Cas., 231; *Fowler vs. Armour*, 24 Ala., 194; *Williams vs. Anderson*, 9 Minn., 50; *Perry vs.*

Simpson, 37 Conn., 520; Maguire *vs.* Woodside, 2 Hilt. N. Y., 59; Clark *vs.* Manchester, 51 N. H., 594; 2 Parsons, Cont., 34, n. (d); *Id.*, 40 n. (s); *Id.*, 517, 520, 658, 672; Wicker *vs.* Hoppuck, 6 Wall., 99; United States *vs.* Addison, 6 Wall., 292; 10 Op. Att.-Gen., 425; 2 Smith, Lead. Cas., 49.)

Thus it is said in the leading American elementary work on the law of contracts that where an employé "is wrongfully *dismissed* during a quarter or other definite term, he may, after the quarter or term ends, recover for the whole in an action, not for work and labor, but for *preventing him* from doing his work." (2 Parsons, Cont., 6th ed., 41.)

3. The amount to be recovered in such case is the pecuniary loss sustained. Thus the supreme court of New York, in illustrating this principle, states a case and lays down the rule of damages as follows:

"A mason is engaged to work for a month, and tenders himself and offers to perform, but his hirer *declines the service*. The next day the mason is employed at equal wages elsewhere for a month. Clearly his loss is but one day; and it is his duty to seek other employment. Idleness is in itself a breach of moral obligation. But if he continues idle for the purpose of charging another, he superadds a fraud which the law had rather punish than countenance." (Shannon *vs.* Comstock, 21 Wend., 462; and see Dillon *vs.* Anderson, 43 N. Y., 239; United States *vs.* Smith, 94 U. S., 214.)

In a case involving a similar principle the same court said:

"In general, in such cases the plaintiff has a right to full pay. This rule has been applied to contracts for the hire of clerks, agents, and laborers for a year or a shorter time. Had it been shown that the plaintiff, after his *dismissal*, had engaged in other business, that might very well have reduced the amount which the defendants otherwise ought to pay. Had it been shown on the trial that employment of the same general nature with that which the contract between these parties contemplated had been offered to the plaintiff and refused by him, that might have furnished a ground for reducing the recovery below the stipulated amount. It should have been business of the same character, and to be carried on in the same region." (Costigan *vs.* M. & H. R. R. Co., 2 Denio, 616; Clark *vs.* Marsiglia, 1 Denio, 317; 2 Smith, Lead. Cas., 53.)

Upon these and many other authorities which might be cited, it seems clear that when an employé is *actually dismissed* and has earned wages elsewhere, or by reasonable diligence might have done so, in business of the same character, the remuneration to which he would otherwise be entitled is to be reduced by the amount he earned, or might have so earned. (2 Parsons, Cont., 6th ed., 34 and 35.)

4. The burden of showing that wages were or might have been earned, is on the employer. (Sedgwick on Damages, [352] 417, n. (2); Barker *vs.* Knickerbocker, 24 Wis., 630; Thompson *vs.* Wood, 1 Hilt.

N. Y., 93; Williams *vs.* Anderson, 9 Minn., 50; Jaffray *vs.* King, 34 Md., 217.)

5. The employés at the Government Printing Office did not find and could not have found employment in the city of Washington or vicinity during the suspension; hence, they come within the rule which awards a right to compensation for the time lost by them. And the fact that they were not dismissed or furloughed makes their right to pay conclusive on the Government.

No formal written or verbal contract has been made with any of the employés. A portion of the compositors were placed on the rolls to be paid at the rate of fifty cents per thousand ems for whatever work they might perform, others to be paid forty cents per hour during the time they worked, and other employés to be paid at a fixed price per day; payments to be made on pay-rolls to be receipted for and paid monthly. There has been no express contract as to the time any employé should be retained. The general and well-known usage has been that the Public Printer could, in lawful exercise of his discretion, (1) permanently discontinue the services of any employé at any time, or, (2) in case of diminished work and consequent necessity for reduction of force, furlough any employé, either for a fixed time or until notice be given to return to the service, or (3) limit and reduce the number of hours employés might work each day, or (4) suspend work on the usual holidays. Furloughed employés were never paid during the time of furlough. The usage prior to the joint resolution of April 16, 1880, had been, not to pay employés for any legal holiday.

There is no statutory provision applicable to employés in the Government Printing Office similar to that in section 1545 of the Revised Statutes, in relation to employés in navy-yards, which limits the right to compensation to "the time during which they may be actually employed." And see, as to a similar limitation, section 171.

The persons in the public service in the Government Printing Office are either *officers* or others employed by contract, express or implied, who are usually denominated "employés."

As to *officers*, no question is presented. They were entitled to be, and were, paid the salary prescribed by statute, wholly without reference to the question whether they were on duty or not during the period in which work was suspended in the Government Printing Office. (Evans's case, *ante*, 8; Seward's case, *ante*, 53; Rev. Stats., 40, 41, 1265, 1742.) Whether the Public Printer can appoint clerks, and thereby constitute them officers, is not material to the present question. (United States *vs.* Germaine, 99 U. S., 508.) Congress has recognized

them as officers and made appropriations for their payment. (Act March 3, 1881, 21 Stats., 390.)

III.—The right of the *employés* to compensation during the period of suspension of work in the Printing Office depends upon the contract under which they respectively served and the law applicable to it.

This contract may be considered with reference (1) to the time of suspended service prior to the President's proclamation, and (2) to the effect of the designation of "a day of humiliation and mourning" made in the proclamation. As to the whole period some general principles will be noticed.

Contracts are *express* or *implied*. In either form special terms or incident rights may be annexed thereto by *usage*. (1 Parsons, Cont., 476; 2 *Id.*, 541; 3 *Id.*, 240; 1 Greenl. Ev., secs. 292–294.) There was in this case no *express* contract, either written or oral; therefore, the agreement under which the employés rendered services, including the special terms thereof which affect the right to compensation, must be inferred or *implied* from circumstances.

The Public Printer was fully authorized to make any lawful contract with each employé which he deemed proper or necessary for the public interest. By *express* written or oral contract he could have reserved a right, with or without cause, at any moment (1) to *terminate* the service of the employé, or, (2) in case of diminished work or for failure of an appropriation, and consequent necessity for reduction of force, to *furlough* him, or, (3) in such case, to limit and reduce the number of hours of work each day, or (4) *suspend the work* during the usual *holidays*, or (5) on the occurrence of some great national event, as, *e. g.*, the obsequies of a President who dies in office, or (6) without any reason or cause requiring such suspension of work. This right on the part of the Public Printer might be inferred from *usage* in each of the cases mentioned, and so become an implied provision of the contract of employment.

The right on the part of the Public Printer (1) to *terminate* the service of any employé, or (2) to *furlough* him under the circumstances stated, or (3) to reduce the number of hours for work each day, exists by implication under *general*, *long-continued*, and *well-known usage* in every contract of employment made by him. After such *termination* or during such *furlough* no right to compensation for services or claim for damages by reason of such termination or furlough exists; and in such case of reduction of hours compensation is due at the prescribed rate only for the actual time of service. The right to *suspend* work during the *usual holidays* is equally well established; and until the

joint resolution of April 16, 1880, gave a right to compensation for the days therein enumerated and under the circumstances therein stated, none was ever paid for the time lost by the suspension.

The Public Printer may, in the exercise of a reasonable discretion, suspend all work for a time, when the good of the service or the public interest or other controlling circumstance so requires, without thereby imposing any liability on the Government.

Employés entering upon service under the Public Printer are by the *usage* referred to notified that their services, and, consequently, their right to compensation, are liable to be interrupted in the several modes and under the circumstances stated. They are chargeable with a knowledge of the law that the Public Printer may do whatever the public interest or the necessities of the service may require, even though such interest or necessities may for a time suspend the opportunity for service and the right to compensation on the part of the employés under him.

But when there is no *express contract* reserving a right to the Public Printer to suspend work in other cases and for other reasons than those named, and there is no usage from which employés may expect the exercise of such right, any other unforeseen and not absolutely necessary suspension must operate as a surprise, must defeat the anticipations which their employment and the nature of the work had created, and so violate their understanding of the nature of their employment. Whatever reasonable men are led to expect from the character of their employment and the general usages affecting it is an implied part of the contract of employment.

Assuming the right of the Public Printer to dismiss or furlough employés and to reduce the hours of service in the cases enumerated, and for any of the reasons stated, this right does not meet the case or questions now presented.

The Public Printer did not *dismiss* any employé from the service, he did not *furlough* any of them as a necessity of the public service, nor did he, by reason of such necessity, reduce the hours of daily employment; but, on the contrary, he, during a period of three and a half working-days, besides the "day of humiliation and mourning," merely deprived the employés of the opportunity to work, and unless they can be paid the reasonable sum they might have earned they must suffer by reason of enforced and unexpected idleness.

If this enforced idleness was justified by any reason which the law can recognize, the employés must suffer the loss. The occasion was the recent death of the President and the lying in state of his remains for

public observation in the rotunda of the Capitol during the general period of mourning. It is not claimed that the *contract* of employment *expressly* reserved a right to suspend work on such occasion. Of course there was no *usage* applicable to such case. It is not perceived, and certainly it is not shown, how any *public interest* required the suspension. There was no general suspension of the work of all the Departments of the Government, or of private printing establishments, or of citizens of the United States, or of the District of Columbia, during the whole period mentioned. The President's proclamation may well be accepted as the proper measure of public respect. It prescribed for the suspension of business one day.

The statute declares that "from the first day of October until the first day of April, in each year, all the Bureaus and offices * * * shall be open for the transaction of the public business at least eight hours in each day * * *." (Rev. Stats., 162.) This does not in terms apply to the Government Printing Office, but it establishes a policy applicable to it. The Printing Office is a very important branch of the public service, and is in many respects auxiliary to the regular Executive Departments.

There is nothing in the prescribed rate of compensation which gives the Public Printer a right to suspend the work. The Government agreed to pay (1) certain compositors fifty cents per one thousand ems for whatever work they might perform, and (2) others forty cents an hour during the time they worked, and (3) some employés a fixed price per day. But in each case there was a fairly implied agreement that each employé should have *continuous employment*, subject to no *interruptions* other than those referred to as being fixed by *usage* or authorized by the public interest, the necessities of the service, or other controlling circumstance affording a reasonable justification therefor, as, *e. g.*, pestilence, conflagration, riot, or other similar cause. The printed notice posted in the Government Printing Office on September 21st seems to carry the inference that the suspension of the work was *unusual* and *unexpected* by employés, (as, from the nature of the occasion, it was,) and hence that it was not such a suspension as was contemplated in the contract of employment. It expressly recognizes the justice of a claim for compensation, but assumes that the law has denied the means of securing this object. The suspension of the work was undoubtedly the result of a generous impulse on the part of the experienced and able public officer who made it, and who, while careful not to exceed his authority in making payment, has employed the proper agency and shown a liberal disposition to secure justice to the

employés. The suspension during the period not covered by the President's proclamation, however well intended as an expression of generous respect for the deceased President on the part of an officer in sympathy with the feelings of a nation and of a local community stricken with grief, was still neither a *legal necessity* nor in pursuance of any authority reserved in the contract of employment or authorized by usage or other controlling circumstance. But, however good or praiseworthy the motive, it resulted in depriving the employés of a right to earn compensation to which, by the contract and the law, they were entitled.

IV.—On the part of those persons employed in continuous service by the day, hour, or fixed price for piece-work, there is no right to compensation for the day fixed by the President's proclamation "as a day of humiliation and mourning."

The proclamation declared that, "in obedience to sacred duty, and in accordance with the desire of the people," the President appointed the 26th day of September, "on which day the remains of our honored and beloved dead will be consigned to their last resting-place on earth, to be observed throughout the United States as a day of humiliation and mourning;" and that he recommended "all the people to assemble on that day in their respective places of Divine worship, there to render alike their tribute of sorrowful submission to the will of Almighty God, and of reverence and love for the memory and character of our late Chief Magistrate."

The proclamation did not seek to enforce obedience to its recommendations, but there can be no doubt that the day was set apart for the purpose stated in obedience to *duty* and the *desire* of the *people*. It may be assumed as a usage that the people respect and obey the proclamations of the President. The usages of the people become law. Bouvier says the common law is "the will of the people"—"the deliberate will of a free people." Kent says "the common law includes those principles, usages, and rules of action applicable to the government and security of person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature." It may be conceded that the proclamation did not have precisely the force of common law, but it was justified by "a decent respect to the opinions of mankind." It created a holiday in the solemn sense of the word. It was such a *controlling element* that the Public Printer might, in reason and in law, regard it as a command, or at least as a justification, for suspending work during that day. If he had not suspended work on that day he would have done violence to the

feelings of the whole people. In view of all this, the assent of the employés in the Government Printing Office to the suspension of the work for that day may, in reason and law, be assumed. It is true the Public Printer did not by reason of the proclamation originally suspend the work for that day, but he anticipated it, thus giving in advance the highest evidence of respect for the will of the people. The suspension of the work for that day having been made with the express assent of the Public Printer and the implied assent of the employés, the latter can be paid no compensation for that day unless by *force of statute, contract, or usage*. There is no statute which gives a right to such compensation. The joint resolution of April 16, 1880, gives a right to compensation under some circumstances for holidays therein named. One of these is the *usual annual* "day of jubilee, public fast, or thanksgiving." It is evident that this is not a "day of humiliation and mourning."

It cannot be claimed that the contract of employment required payment for days on which by *mutual agreement* no work was done. As to compositors, printers, and binders, the statute gives no authority to make a contract to pay for *such* time. It contemplates actual service, and those who claim pay under it must render or tender service, unless the tender be unnecessary because of notice that service would not be accepted. It is competent to show a *usage* to pay for holidays in the case of employés engaged for a *prescribed time*, (*Regina vs. Stoke*, 5 Ad. & El., N. S. 303; 1 Greenl. Ev., sec. 292; *United States vs. Buchanan*, 8 How., 102;) but no such usage is shown in this case.

The joint resolution of April 16, 1880, (21 Stats., 304,) was passed because there was no such usage as to ordinary holidays.

The joint resolution of May 31, 1880, (21 Stats., 307,) recognizes the right of the President to issue a proclamation "closing all [executive] departments * * * including the Government Printing Office," on "Decoration Day." It might be argued with great force that these resolutions should be construed as indicating an intention on the part of Congress to confer on employés in the Government Printing Office the same rights that are enjoyed by employés in the Executive Departments in respect of pay for all days on which the Departments and Printing Office are closed by Executive order or proclamation, and hence that the employés of the Government Printing Office are entitled to be paid for the 26th day of September; in other words, that these resolutions recognize the practice of the Executive Departments in respect of paying employés for such days as a *lawful custom*, and that the intent was to make that custom applicable to contracts for service in

the Printing Office. The laws authorizing pay to officers and employes should, when there is any doubt as to their meaning, be construed in favor of the officers and employes. (*United States vs. Morse*, 3 Story, C. C., 87, 91; *Leake's case*, *ante*, 431, 439.) This rule applies, however, only when the statute or statutes admit of two interpretations; and such interpretations do not seem to be permissible in respect of these resolutions, since they provide expressly for certain named days. They cannot be extended to include other days. *Expressio unius est exclusio alterius*.

It must, therefore, be held that the persons employed in the Government Printing Office under contract to be paid for actual work done or actual time employed are not entitled to compensation for the 26th day of September.

V.—Accounting officers of the Treasury have no jurisdiction over claims for unliquidated damages sounding in tort; but, excepting uncertain damages resting in opinion, and not accurately ascertainable by evidence and computation, the proper accounting officers have, under sections 236, 269, 277, and 317 of the Revised Statutes, authority to allow claims for damages not sounding in tort, when there is an appropriation available. Damages not sounding in tort arise in different classes of cases, and are of different kinds, among which are liquidated and unliquidated damages. Thus, it is said that when parties agree upon a sum which shall be the damages which he who violates the contract shall pay to the other, the damages thus agreed upon beforehand, when sanctioned by, or not in violation of, the law, are called *liquidated damages*. (3 Pars. Cont., 156; 2 Chit. Cont., 11th Am. ed., 1317.) Again, liquidated damages are defined as those “whose amount has been determined by anticipatory agreement between the parties.” (Bouv. Dict.) So, if the circumstances make the contract price the measure of damages, that price constitutes liquidated damages. “*Unliquidated damages*” are those which are unascertained, such as require evidence to fix the amount which should be allowed. These damages arise in different classes of cases. Thus, in some cases they rest, in a large measure, on opinion, or they “depend upon the peculiar circumstances of each particular case, which cannot be ascertained by calculation or computation, as [1] damage for not using a farm in a workmanlike manner, [2] for not building a house in a good and sufficiently strong manner, [3] on warranty in the sale of a horse, [4] for not skillfully amputating a limb, and [5] other cases of like character.” (*Butts vs. Collins*, 13 Wend., 156; *Sedgwick, Damages*, 524; 2 Greenl. Ev., sec. 259.) In many cases of unliquidated damages

the amount is ascertainable upon proper evidence by computation. Thus, it is said, "where * * * the damages are capable of being certainly known and estimated" the injured party is not limited to a prescribed penalty. (*Baird vs. United States*, 96 U. S., 430; 2 Greenl. Ev., sec. 258.) The maxim that *Id certum est quod certum reddi potest* applies in such case.

Unliquidated damages sounding in tort are not the subject of an "account."

Bouvier defines an "account" as "a detailed statement of the mutual demands *in the nature of debt* and credit between parties, arising out of contracts or some fiduciary relation." (Law Dict., tit. "Account;" *Whitwell vs. Willard*, 1 Metc. Mass., 216; *Blakeley vs. Biscoe*, Hempst. Ark., 114; *Portsmouth vs. Donaldson et al.*, 32 Pa. St., 204; 2 Greenl. Ev., sec. 37.) He defines "debt" as "a sum of money due by certain and express agreement." (See 2 Greenl. Ev., sec. 279.) Damages, on the contrary, are given as a compensation, recompense, or satisfaction for an *injury* actually received. (Bouv. Law Dict., tit. "Damages;" 2 Greenl. Ev., sec. 253.)

While the statutes which give the First Auditor and First Comptroller jurisdiction do not extend to claims for unliquidated damages sounding in tort, nor to uncertain damages resting in opinion and not ascertainable by evidence and computation, they clearly *do* give jurisdiction of claims for damages not sounding in tort, the just amount of which may be ascertainable from the circumstances of the case.

The Revised Statutes provide as follows:

"SEC. 236. All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

There is, in practice, no mode for settling and paying a claim against the United States other than by stating an account therefor, and certifying that a balance is due the claimant. (Senate-Disbursement case, *ante*, 404, 407.) Until this is done, no warrant authorizing payment can issue. As the accounting officers are alone authorized to state and settle the public accounts which are adjusted "in the Department of the Treasury," and certify the balances due, it follows that they have jurisdiction over all claims against the United States which are to be settled and adjusted "in the Department of the Treasury."

The Revised Statutes provide:

"SEC. 269. It shall be the duty of the First Comptroller: * * *
To examine all accounts settled by the First Auditor * * *."

"SEC. 277. * * * The First Auditor shall receive and examine all *accounts* accruing in the Treasury Department * * *."

(1.) The language of the statutes applies only to *accounts* and to claims which may properly be made the subject of an account, and not to claims for damages for breach of contract sounding in tort. It is true that section 236 of the Revised Statutes refers to "all claims and demands," but, taking in view all the provisions together, the words may be aptly restricted to claims for money due and ascertainable under contract, upon the maxim that "general words may be aptly restrained according to the subject-matter." (Broom, L^g. Max., 646.)

(2.) This view is sustained by repeated opinions of the Attorneys-General. Thus, on the 7th of June, 1854, Attorney-General Cushing in an elaborate opinion held that "the Comptrollers and Auditors of the Treasury have no general authority to award damages as for tort on contract broken; their jurisdiction is confined to matters of *account* arising *ex contractu*, or by operation of law." He shows that "an auditor is he who *audits*, and is defined to be a person appointed or authorized to *examine an account*, compare the charges with the vouchers, hear the parties, allow or reject charges, and state the balance. To audit is to examine and adjust an *account*." (6 Op. Att.-Gen., 523.) In the various forms and uses of the term *account* "there is exclusion of the idea of *damages*, the amount of which is not the result of computation merely, but involves other considerations, and especially the determination of indemnity for breach of contract, sounding in tort, and depending on various premises of law and fact." (6 Op. Att.-Gen., 523; 2 Op., 457; 4 Op., 112, 327, 590; 5 Op., 28, 630; Opinion of July 2, 1832, ed. 1841, p. 882; 8 Op., 298.)

(3.) Uniform *usage* long continued has settled the construction of the statutes cited. It was said in 1854, in the opinion of Attorney-General Cushing, just cited, that "it would be an unheard-of thing for an auditor, appointed to audit an account, to enter into a question of unliquidated damages [sounding in tort] for breach of contract." (6 Op. Att.-Gen., 524. See *Baird vs. United States*, 96 U. S., 430; *McKee's case*, 12 Ct. Cls., 556.)

This usage has prevailed ever since. (Digest, Second Comptroller Broadhead's Decisions, pp. 29, 53.)

There may be some claims growing out of breach of contract which can be paid as for "sums actually expended and lost" in part execution of a contract, and others of like character. But it would be a very large power to award damages in all cases of claims founded on contracts broken by the refusal to receive goods or services tendered according to contract, where the claim is one sounding in tort. Such

power has, as far as can be ascertained, not been exercised by the accounting officers. The fact that accounting officers have not exercised it may be regarded as evidence of long-settled construction that they were not clothed with a jurisdiction to assess damages in such cases.

In the courts three remedies are open to an employé rendering service at fixed wages who is wrongfully dismissed or wrongfully prevented from performing his contract, either one of which he may pursue, to wit: (1) Treat the contract of employment as *rescinded*, and sue in debt or assumpsit for the wages due; (2) at the end of the contract period of service, or time when wages become due, sue and recover damages; (3) without waiting until the expiration of the contract period, immediately sue for any *special injury* sustained in consequence of a *breach* of the contract in being denied the privilege of performance. (Rogers *vs.* Parham, 8 Cobb, Ga., 193; Masterton *vs.* Mayor, 7 Hill, N. Y., 61; 2 Smith's Lead. Cas., 23, 45, 46; 2 Pars. Cont., 6th ed., 34, *n.* (d), 41, *n.* (s); 2 Greenl. Ev., sec. 104; Sedgwick, Dam., 6th ed., 224, 267, *n.*; Fowler *vs.* Armour, 24 Ala., 194; Goodman *vs.* Pocock, 15 Q. B., 526; 6 Op. Att.-Gen., 521.)

In the first and second cases stated, the claims would usually be for *liquidated* damages—a mere matter of account; in the other case the claim would be for *unliquidated* damages. In the last case stated, the claim may be for the amount of the wages the claimant might have earned under the contract, less the amount he might have earned elsewhere. Such amount is uncertain, and depends on evidence. The authority of accounting officers to take jurisdiction of such case is not now presented for decision.

VI.—The claim of the employés in the case under consideration is, upon the facts stated, so far liquidated damages as to be within the jurisdiction of the accounting officers. Their claim is based on a continuous contract of service, but they were not dismissed from employment. Service was interrupted without their consent. They were, however, expected to be (as in fact they were) in readiness to return to work at any time, notwithstanding the suspension; and, in the mean time, so far as appears, they were not, and could not have been, employed here at their respective occupations or trades.

1. When an employé under a contract for continuous service is, without his consent, temporarily and without sufficient excuse interrupted in his work by his employer, the contract of service remains in force. The employé is required by his contract to be in readiness for duty on call; he is, therefore, entitled during such interruption to payment at the contract rate of wages. His claim in such case is not for uncertain, unliquidated damages, but for the contract compensation. This prin-

ciple is sustained in many cases. Thus in *Little vs. Mercer* (9 Mo., 218) the action was debt upon a sealed instrument to recover the price agreed to be paid to plaintiff for building the abutment of a bridge. The employé commenced the work, and would have completed it, but was prevented by the employer. It was not alleged that the plaintiff could, or did, procure employment elsewhere during the time requisite to complete the work. The court said "the plaintiff could sue on the covenant and recover the contract price of the *work* as though it had been completed." In a similar case, *Clendennuen vs. Paulsel*, (3 Mo., 230,) the court said the employé "might have sued on the *covenant* and have alleged the prevention, in which case he would have been entitled to his money as if he had performed his covenant." In *Helm vs. Wilson* (4 Mo., 41) it was said: "It is a general rule of law that a contract must be performed according to the terms of the agreement before the party can have any right of action. This rule, however, is subject to some qualifications. One is, that if the other party will prevent the execution of the agreement, then the action will lie, and the plaintiff's right to recover is as complete as if the contract had been fully executed." The same rule has been applied in New York, where it has been held that "where one contracts to employ another for a certain time at a specified compensation, and discharges him without cause before the expiration of the time, he is, in general, bound to pay the full amount of wages for the whole time." (*Costigan vs. M. & H. R. R. Co.*, 2 Denio, 609; 2 Chit. Cont., 11th Am. ed., 840 *et seq.*; *Posey vs. Garth*, 7 Mo., 94; *Marsh vs. Richards*, 29 Mo., 99; *Robinson vs. Hindman*, 3 Esp., 235; *Beeston vs. Collyer*, 4 Bing., 309; *Stewart vs. Walker*, 14 Pa. St., 293; 2 Smith's Lead. Cas., 49; 2 Greenl. Ev., sec. 261, *n. (a)*; *Sedgwick, Dam.*, 6th ed., 213, 251.) The case of *Dillon vs. Anderson*, (43 N. Y., 231,) in which the opinion was delivered by a learned judge who is now Secretary of the Treasury, though not on the exact question, throws much light on principles in accord with those stated. The United States is generally held to the same liability upon contracts as individuals. (*Great Falls Mfg. Co.'s case*, 16 Ct. Cls., 179.) There is, of course, a difference in principle between contracts for *personal services* and those for supplying materials. A party who contracts to supply materials which are tendered but not received, does not necessarily lose them, and when he does not he cannot recover full value.

As to employés under a contract for continuous service on an agreed compensation per day, month, or hour, no doubt exists concerning their right to *full* payment. It is not shown that there was, by contract or usage, a right, unnecessarily and without adequate cause, to suspend work in the Government Printing Office at the end of any day, month,

or hour. It may be urged that the rule of compensation, or of "damages against the employer for the breach of a contract to perform mechanical work by the piece, is different," and that this rule should be applied to compositors employed at fifty cents per thousand ems actually set. (*Clark vs. Marsiglia*, 1 Denio, 317; 2 Greenl. Ev., sec. 261, note (a).) Undoubtedly, if the employer by contract *reserve a right to suspend work or to terminate a contract when any piece of work is finished*, he may do so without incurring a liability to damage. So, if a party agree to furnish materials and make a given number of articles, and his contract is terminated and he does not furnish all the materials, he is clearly not entitled to payment for the materials not furnished. (*Dillon vs. Anderson*, 43 N. Y., 237—*Folger, C. J.*; *Clark vs. Marsiglia*, 1 Denio, 317.) But a printer paid by the month on continuous service upon an agreed compensation of fifty cents per thousand ems occupies no such position. The mode of ascertaining the rate of his compensation does not, in the absence of a special agreement or usage, abridge his right to continuous employment. By every principle of reason he is entitled to the wages he might have earned.

2. The act of the Public Printer was not a tort. It is well settled that "the Government is not responsible for the malfeasance, or wrongs, or neglects, or omissions of duty of the subordinate officers or agents employed in the public service." (*Story, Agency*, sec. 319; *U. S. vs. Kirkpatrick*, 9 Wheat., 720; *U. S. vs. Vanzandt*, 11 Wheat., 190; *Dox et al. vs. The Postmaster-General*, 1 Peters, 318, 325; *Johnson et al. vs. United States*, 5 Mason, C. C., 441; *U. S. vs. Buchanan*, 8 How., 83; *Seymour vs. Van Slyck*, 8 Wend., 403; *Nicholson et al. vs. Mounsey & Symes*, 15 East, 384, 393; *Duncan vs. Findlater*, 6 Clark & Fin., 903; 6 Op. Att.-Gen., 617.) This rule exempts the Government from liability in those cases in which, as between private persons, relief would be sought in courts in actions of tort, or *ex delicto*. It has no application when the action is *ex contractu*. (*Gibbons vs. U. S.*, 8 Wall., 269; *Bank of Boston vs. U. S.*, 10 Ct. Cls., 519, 545; 10 Op. Att.-Gen., 416; 7 Op., 88; *Parks vs. Ross*, 11 How., 362; *Great Falls Mfg. Co.'s case*, 16 Ct. Cls., 160; *Field's case*, 16 Ct. Cls., 448; *United States vs. State Bank*, 96 U. S., 36; *Speed vs. U. S.*, 8 Wall., 77.)

If the employés who were denied the privilege of rendering service consented to the suspension of work, they would have no claim to any remuneration. *Volenti fit non injuria*. (*United States vs. Wormer*, 13 Wall., 25.) It is not alleged that they were consulted or asked to consent; and in fact they did not consent.

3. If any employé was *unable* during the period of suspension to render service, he suffered no damage by the suspension, and can receive

no remuneration. (*Cuckson vs. Stones*, 1 Ellis & Ellis, Q. B., 248; 2 Chit. Cont., 11th Am. ed., 854.)

Subject to the limitations and qualifications stated, the right of the employés in the Government Printing Office to remuneration for the loss they respectively sustained by the suspension of the work on the days in question, is well supported by law. The law which gives such right to remuneration is reasonable and just. It would be strange indeed if an employer, whether a private citizen, a corporation, or the Government, could make a contract giving an employé the right to earn wages in a continuous service, or for a fixed time, and afterwards while the employé is at work turn him out, close the door on him without his consent, deny him the privilege agreed upon, and then turn about and say to him, "You performed no 'piece-work' or 'time-work,' and shall therefore have neither the stipulated compensation nor any money in lieu of that which you might have earned." The public service, as well as private, is promoted by justice and fair dealing. An exact observance of contracts affords the surest means of securing *competent, faithful* employés, and at reasonable rates of wages. If they must incur hazards, they will inevitably indemnify themselves against loss by demanding greater wages. If officers intrusted with the power to make contracts of employment deem it just to avoid liability on the part of the Government in cases of suspended work, contracts can be made accordingly.

VII.—Congress has made no express appropriation for the payment of claims for unliquidated damages. The current appropriation for public printing is, however, applicable to the payment of *wages* to which employés are entitled by contract. The act of March 3, 1881, (21 Stats., 455,) under the caption of "public printing and binding," makes an appropriation as follows:

"For the *public printing*, for the *public binding*, and for *paper for the public printing*, including the cost of printing the debates and proceedings of Congress in the Congressional Record, and for lithographing, mapping, and engraving for both Houses of Congress, the Supreme Court of the United States, the supreme court of the District of Columbia, the Court of Claims, the Library of Congress, and the departments, and for all the necessary materials which may be needed in the prosecution of the work, one million seven hundred thousand dollars * * *."

Accidents may interrupt employment, and if, in such cases, it is intended that the loss of time should fall on employés, such intention may be shown by *contract* or *usage*. It is well known that private printing establishments in similar cases frequently, pursuant to contract, pay men for time unemployed, when the business is temporarily

suspended. It may well be supposed that Congress in creating the office of Public Printer designed to give him the powers necessary in the management of a great office. One of the rules of the Printers' Typographical Union of the District of Columbia is as follows:

"When compositors employed by the piece are compelled to be idle for want of letter, copy, or any other cause, 40 cents per hour shall be charged: *Provided*, That this rule shall not apply if the employer does not require the compositors to remain in or near the office."

This rule, if consented to either *expressly* or by *usage*, may become a part of the contract of employment. Whether this rule applies to the Government Printing Office, or whether any such usage exists as to it, does not appear. Whether it does or not, the Government can afford to be as just and liberal as any private employer in the District of Columbia. But the right does not depend on this rule; it exists by contract, and the contract is to be construed liberally.

The conclusion is that employes in the Government Printing Office, serving under continuous contracts, who were on the days in question without their assent, and without such reason as the law sanctions, suspended from work, but required to be in readiness to resume it, who neither could nor did secure employment in the mean time, and who in no respect violated the contract of employment on their part, are, in the absence of any usage in such case excluding the right to compensation, entitled to the payment of such wages as might have been earned during the period of suspension. Time-work can be estimated for the legal day of eight hours. Piece-work can be estimated by the usual amount performed when in service.

Payment by the Public Printer in accordance with this conclusion, on rolls by him certified, will be deemed valid, and such rolls will be allowed as vouchers in his accounts as disbursing officer. It is not required that the certificate shall show the performance of work, but only the amount to which each employé is entitled in accordance with this opinion.

The Public Printer will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, December 3, 1881.

NOTE.—The Public Printer, notwithstanding this opinion of the Comptroller, declined to pay the employes for any part of the time in which work was suspended by him. January 31, 1882, Hon. A. S. McClure, from the Committee on Printing, submitted a report (No. 166, 1st Sess., 47th Cong.) in the House of Representatives, in favor of allowing payment of compensation to the employes in the Government Printing Office for the whole time lost by the suspension of work. The report was adopted, and a joint resolution was passed, approved July 12, 1882, by which the Public Printer was "directed to pay the employees of the Government Printing Office the pay deducted from them for the time lost during the obsequies of the late President James A. Garfield, during the month of September, eighteen hundred and eighty-one."

**IN THE MATTER OF REPAYING, WHEN PURCHASERS ARE
EVICTED THROUGH FAILURE OF TITLE, THE PURCHASE-
MONEY OF LANDS SOLD FOR DIRECT TAXES.—EDMUNDS'
CASE.**

1. If a permanent specific appropriation has been incorporated in the Revised Statutes as a permanent annual appropriation, the character affixed to it by the revision must prevail.
2. Section 5597 of the Revised Statutes saves rights accruing or which have accrued under statutes repealed and supplied by the revision.
3. The acts of May 9, 1872, (17 Stats., ch. 145, p. 89,) and June 8, 1872, (17 Stats., ch. 337, p. 332,) are not, nor is any provision of either, repealed by the enactment of the Revised Statutes, although section 2 of the former act, as amended by section 9 of the latter, made an appropriation, the provision for which has been incorporated in section 3689 of the Revised Statutes.

December 12, 1881, the Hon. George F. Edmunds, chairman of the Committee on the Judiciary, United States Senate, addressed to the First Comptroller the following letter:

“SIR: I beg leave to call your attention to the act of 9 May, 1872, chap. 145, vol. 17, p. 89, and to the last section of the act of 8 June, 1872, chap. 337, vol. 17, p. 332, and to ask whether the provisions of those two acts, or any part thereof, have been carried into the Revised Statutes, or into any amendment thereof? The only thing that I can find on the subject is section 3689, where, under the permanent appropriation provisions, the law provides for the payment to a purchaser, &c., whose title fails, without an annual appropriation. I shall be glad to know whether these provisions of the acts of 1872, or any of them, are still in force, and if so, how, and have thought that your office might perhaps inform me without trouble.”

OPINION BY WILLIAM LAWRENCE, *First Comptroller:*

TREASURY DEPARTMENT,
First Comptroller's Office,
Washington, D. C., December 19, 1881.

HON. GEORGE F. EDMUNDS,
Chairman Judiciary Committee, United States Senate.

SIR: I have the honor to acknowledge the receipt of your letter of the 12th instant, asking whether the provisions of the two acts referred to therein, or any part thereof, have been carried into the Revised Statutes, or into any amendment thereof, and whether the provisions of these acts, or any of them, are still in force; and, if so, how.

In answer, I state that the acts referred to have not, nor has any

part thereof, been carried into the Revised Statutes, nor into any amendment thereof, except in so far as section 3689 of the Revision (page 724) makes a "permanent annual appropriation" of such sums "as may be necessary" "to repay to purchasers evicted through failure of title from lands sold to them in insurrectionary districts for direct taxes" the purchase-money of such lands. This appropriation was originally made in section 2 of the act of May 9, 1872, and it was continued in section 9 of the act of June 8, 1872, amending the former section. The appropriation as found in the original statutes might possibly be deemed a "permanent specific" appropriation, whereas in the Revised Statutes it is inserted as a "permanent annual" appropriation, which differs in some respects from a "permanent specific one." (Ashton's case, 1 Lawrence, Compt. Dec., 166.) The character affixed to it by the revision must prevail. (*United States vs. Bowen*, 100 U. S., 508, 513; *United States vs. Hirsch*, 100 U. S., 35; *Arthur vs. Dodge*, 101 U. S., 34; *United States vs. Claflin*, 97 U. S., 548; *Bechtel vs. United States*, 101 U. S., 597; *Audit case*, 1 Lawrence, Compt. Dec., 43, n.; *Tillamook case*, *Id.*, 133.)

The question as to whether the provisions of these acts or any of them are still in force, is not without difficulty. It is to be considered in view of the following sections of the Revised Statutes:

"SEC. 5595. The foregoing seventy-three titles embrace the statutes of the United States *general and permanent in their nature*, in force on the 1st day of December one thousand eight hundred and seventy-three * * *.

"SEC. 5596. All acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, *any portion of which is embraced in any section of said revision, are hereby repealed*, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day no part of which are embraced in said revision, shall not be affected or changed by its enactment.*

"SEC. 5597. The repeal of the several acts embraced in said revision, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner, as if said repeal had not been made; nor shall said repeal, in any manner affect the right to any office, or change the term or tenure thereof."

As to these sections, it may be said that the *appropriation* made in the acts of 1872, and carried into section 3689 of the Revised Statutes, was, by the revisers, deemed "general and permanent" in its nature, else it could not have been incorporated into the revision. On this theory, it may, possibly, be difficult to perceive why that part of section 9 of the act of June 8, 1872, which gave, in cases of eviction, as well before as after June 8, 1872, a right of repayment of tax purchase-money to the purchasers of lands sold to them under the direct-tax act, is not, also, "general and permanent." The omission of this part of the section is, in this view of the case, some evidence of its repeal. The omission is not, however, conclusive on this point. (*Bechtel vs. United States*, 101 U. S., 598.) The case of a person evicted from lands purchased at direct-tax sales in the insurrectionary States comes clearly within the proviso of section 5596, which continues in force any appropriation, or *any provision* "of a *private, local, or temporary* character," contained in acts from which any general and permanent provision has been incorporated into the Revised Statutes. This proviso saves every right *accruing* or accrued under the acts of 1872. The duties imposed, the authority given, and the protection afforded—in short, all the provisions of these acts are to be deemed as "private, local, or temporary" in character, within the meaning of section 5596.*

Congress has, since the enactment of the Revised Statutes, recognized these acts as being in force, and thereby sanctioned the construction stated. (Act June 23, 1874, chap. 466, 18 Stats., 252; Act August 14, 1876, chap. 273, 19 Stats., 141; Act June 14, 1878, chap. 191, 20 Stats., 128.) This construction is supported by reason, justice, and policy. Every reasonable presumption is to be indulged against repeal in such case as this. In prescribing a revision, Congress intended that, as far as practicable, the statutes should be compiled so as to retain only laws of a general and permanent character, and not to affect provisions of a private, local, or temporary character.

I have the honor to be, very respectfully,

WILLIAM LAWRENCE,

Comptroller.

*The statutes which levied direct taxes authorized a sale of lands to pay them. (12 Stats., 422, 640; 13 Stats., 501.) The act of May 9, 1872, (17 Stats., 89,) prohibits a recovery from the tax-purchasers by the original owner of lands, "without showing, in addition to other necessary facts, that all taxes * * * due * * * have been paid," and it provides that persons evicted through failure of title shall be repaid the purchase-money. The appropriation is in these words:

"The Secretary of the Treasury * * * is hereby authorized, out of any money in the Treasury not otherwise appropriated, to repay to the person or persons entitled thereto a sum of money equal to that originally paid by the purchaser."

The act of June 8, 1872, (17 Stats., 330,) amended by the act of March 3, 1873, (17 Stats., 600,) provides that lands owned by the United States by virtue of proceedings

under the direct-tax act of June 7, 1862, and supplemental acts, may be redeemed by the original owners within two years on prescribed conditions; that lands unredeemed at the end of two years shall be sold at public auction; that proceeds of certain sales shall be applied for school purposes; and that specified tracts are granted for specified purposes. By the acts of June 23, 1874, (18 Stats., 252,) and August 14, 1876, (19 Stats., 141,) the period for redemption was extended to February 1, 1877. These acts have been treated as in force by the Treasury Department. The Commissioner of Internal Revenue, in a letter, May 3, 1880, to the Secretary of the Treasury, on the subject of direct taxes, says:

"Congress, by an act approved May 9, 1872, provided for the relief of direct-tax purchasers who should be evicted and turned out of possession of the lands purchased by them by the judgment of any United States court; and by an act approved June 8, 1872, provided again for the redemption of the lands which had been acquired, and were still owned by the United States, excepting therefrom "school-farms," national cemeteries, light-house sites, and military and naval reservations.

"The provisions under this act for redemptions were continued from time to time by Congress until February 1, 1877. The time expired, and the lands which had been redeemed under the act of June 8, 1872, in South Carolina and Tennessee, were advertised for sale by this Department, and were sold at public sale, leaving such as were situated in Virginia and Florida unsold, and still owned by the United States.

"I respectfully recommend that the lands owned by the United States in Virginia and Florida, which come within the provisions of the act of June 8, 1872, amended by acts of February 8, 1875, and August 14, 1876, be advertised and sold at public auction."

IN THE MATTER OF THE RIGHT OF AN OFFICER IN THE DEPARTMENT OF AGRICULTURE TO HOLD ALSO AN OFFICE IN THE DEPARTMENT OF THE INTERIOR.— RILEY'S CASE.

1. When one person is invested with two distinct offices, he may receive the salary appropriated by law for each, except in the cases prohibited by section 2074 of the Revised Statutes, notwithstanding the offices are in different Executive Departments, and the salary for one of them exceeds \$2,500 per annum.
2. The proviso in section one of the act of September 30, 1850, (9 Stats., 453, 542,) prohibiting the allowance to one individual of the salaries of two offices, on account of having performed the duties thereof at the same time, even though it be construed as prohibiting an individual from holding two offices at the same time, is not now in force, being omitted from the Revised Statutes.
3. Neither the act of June 20, 1874, (18 Stats., 103,) nor sections 1763, 1764, and 1765 of the Revised Statutes prohibit one person from holding two offices and receiving the salary of each, when such offices are compatible.
4. The entomologist in the Department of Agriculture is an officer of that Department.
5. The members of the Commission of Skilled Entomologists, appointed under the act of March 3, 1877, (19 Stats., 357,) are also officers serving in or under the Department of the Interior.
6. The decisions in Audit case (1 Lawrence, Compt. Dec., 43, *note*,) and Tillamook case, (*Id.*, 138,) so far as they relate to repeals by the Revised Statutes, referred to.
7. An appropriation to pay the "*expenses*" of a commission to be appointed by the head of a Department, does not authorize the payment to the members of the commission of a salary to be fixed by the appointing power.

8. Whether two offices held by one person by appointment respectively of two heads of different Departments, are *incompatible—quere?*
9. A legislative recognition of a right generally affirms and establishes such right.

C. V. Riley was, during the fiscal year ending June 30, 1879, an officer—the entomologist—in the Department of Agriculture, with an annual salary of \$2,000. (Rev. Stats., 522.) During the same time he was chief of the “commission of three skilled entomologists” which was appointed by the Secretary of the Interior, under a clause in “An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and seventy-eight, and for other purposes,” approved March 3, 1877. (19 Stats., 344, 357.) The clause is as follows:

“To pay the *expenses* of a commission of three skilled entomologists, to be appointed by the Secretary of the Interior, to report upon the depredations of the Rocky Mountain locusts in the Western States and Territories and the best practicable methods of preventing their recurrence, or guarding against their invasions, who may be attached to the United States Geological and Geographical Surveys of the Territories, eighteen thousand dollars.”

The act of June 20, 1878, (20 Stats., 206, 240,) makes appropriations for the fiscal year ending June 30, 1879, one clause of which is as follows:

“To continue and complete the work of the United States Entomological Commission attached to the United States Geological and Geographical Survey of the Territories, in the special investigation of the Rocky Mountain locust or grasshopper, the sum of ten thousand dollars; to be immediately available.”

The appointment of Professor Riley, made by the Secretary of the Interior March 21, 1877, recites that he is “appointed a member of that commission, and will act as chief, with a salary at the rate of \$3,000 per annum.”

December 15, 1881, Professor Riley addressed a letter to the Secretary of the Treasury, stating that he performed the services in both the capacities stated, and has not been paid salary as chief of the commission for the fiscal year ending June 30, 1879; and asking that his claim of \$3,000 therefor be reported to Congress under the act of June 14, 1878. (20 Stats., 130.) He did receive, for that period, the salary provided by law for the entomologist of the Department of Agriculture.

December 21, 1881, this letter was by the Secretary referred to the First Comptroller “for consideration in connection with” said act.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

It is now well settled that when one person has been fully invested with two compatible offices he may receive the salary appropriated pursuant to law for each. (12 Op. Att.-Gen., 459; 15 Op., 317; 16 Op.,

7; Herndon's case, 1 Lawrence, Compt. Dec., 48; Wade's case, *Id.*, 302; Bender's case, (second,) *Id.*, 391; Landram's case, 16 Ct. Cls., 75.)

A proviso to section 1 of the appropriation act of September 30, 1850, (9 Stats., 542,) enacts—

"That hereafter the proper accounting officers of the Treasury, or other pay officers of the United States, shall in no case allow any pay to one individual the salaries of two different offices on account of having performed the duties thereof at the same time. But this prohibition shall not extend to the superintendents of the executive buildings."

This proviso denied a right to dual pay "on account of having performed the duties" of two offices. It is not explicit as to the rights of a party who actually held two compatible offices; but the Court of Claims decided, under this proviso, that "a person holding two different offices cannot receive the pay of both." (Talbot's case, 10 Ct. Cls., 426.) Section 48 of the Revised Statutes, in relation to certificates of salaries and expenses of Senators and Representatives in Congress, is taken from this statute. No other provision of the act than that which provides for these certificates has been incorporated in the revision. Section 5596 of the Revised Statutes declares that when "any portion" of an original statute "is embraced in any section of said revision" all the residue of said act is repealed. The proviso in section 1 of the act of September 30, 1850, is not in the Revised Statutes; and if it was intended to deny to the incumbent of two compatible offices payment of the salaries of both, it might be urged with some force that it has been repealed. (Rev. Stats., 5596; *United States vs. Claflin*, 97 U. S., 548; *United States vs. Bowen*, 100 U. S., 513; *Bechtel vs. United States*, 101 U. S., 597; *Collins's case*, 15 Ct. Cls., 22. But see *Audit case*, 1 Lawrence, Compt. Dec., 43, *note*, and *Tillamook case*, *Id.*, 138.)

The numerous decisions in which it is held that when one person is the incumbent of two compatible offices he is entitled to the salaries of both show that this proviso has long been regarded as superseded by other legislation. The marginal notes to sections 1763, 1764, and 1765 of the Revised Statutes seem to indicate that this was the view of the revisers, though these notes cannot be used as evidence of the proper construction. Neither section 1763 of the Revised Statutes nor the act of June 20, 1874, (18 Stats., 109, sec. 3,) prohibits the payment to one person of the salaries of two compatible offices if he is the incumbent of both offices. There is an exception to the right "to hold more than one office" under Title XXVIII of the Revised Statutes relating to Indians. Such exception implies that in the cases prohibited by it there was previously a right to hold two offices.

If the claimant held two compatible offices, he is entitled to the salaries of both, provided such salaries have been authorized and prescribed by law. His right to the salaries of two distinct offices is not denied by sections 1764 and 1765 of the Revised Statutes. As entomologist in the Department of Agriculture he was an officer, with a "salary * * * fixed by law." Section 1765 of the Revised Statutes declares that "no officer * * * whose salary * * * [is] fixed by law * * * shall receive any additional pay * * * for any other service or duty * * * unless * * *." This section denies to a salaried officer the right to any compensation other than his salary when he performs the duties of any other Government office or employment to which he has not been appointed pursuant to the law providing for such other office or employment. If, therefore, the claimant was, by virtue of his appointment as a member of the "Commission of Skilled Entomologists," an officer, and the law authorized a salary for the chief of the commission, he is entitled to such salary; otherwise, he is not. The chief of the commission has high official sanction to be considered an officer. The commissioners appointed by the President for the Centennial Exhibition, under section 3 of the act of March 3, 1871, (16 Stats., 470,) have been regarded as "officers of the United States," though they were charged only "with duties of a special and temporary character," and acted *without compensation*. They have been regarded as officers, because, among other reasons, they are comprehended in section 7 of the act under the term "officers," and the Government was "interested in the performance of their duties," (15 Op. Att.-Gen., 187;) but the latter reason is not of much force, since the same may be said of the services of contractors and employés who are not officers.

Mr. Justice Miller, delivering the opinion of the Supreme Court, in *United States vs. Germaine*, (99 U. S., 511,) said, in respect of the opinion in *United States vs. Hartwell* (6 Wall., 385,) that, "in that case, the court said the term [office] embraces the ideas of [1] tenure, [2] duration, [3] emolument, and [4] duties, and that the latter were [5] continuing and permanent, [6] not occasional or temporary." This was said in connection with the duties of an examining surgeon appointed by the Commissioner of Pensions, who "is only to act when called on by the Commissioner of Pensions in some special case," and whose "duties are *not* continuing and permanent," but only "occasional and intermittent." (*United States vs. Germaine*, 99 U. S., 512; *United States vs. Moore*, 95 U. S., 760; Herndon's case, 1 Lawrence, Compt. Dec., 49; Collins's case, 14 Ct. Cls., 568; Collins's case, 15 Ct. Cls., 22.) When, as in the case under consideration, duties are continuous for a

year, they are sufficiently permanent to answer the character of permanency incident to an office, for many offices are limited in duration to a year.

The position of the claimant as a member of the "commission" had all the elements of an office named by the Supreme Court except that of emolument. But emolument is not always an element of an office. There are, or may be, offices of trust and duties without profit. (Const., Art. II, sec. 1, cl. 2.)

The claimant, as a member of the commission, was an officer. But the act of March 3, 1877, under which he was appointed, gave him no right to *salary*. It authorized the payment of *expenses*. The word "expenses," in statutes authorizing payment thereof, is not sufficiently comprehensive to include or authorize the payment of a salary. It should, in respect of the entomological commission, be thus construed by reason of the usual meaning of the term, and because, in the absence of a reasonably clear intention, it is not to be presumed that Congress has left the amount of a salary to be fixed in the discretion of any officer. In statutes providing for the payment of the expenses of commissioners, the usage has been not to pay salaries.*

The claimant could not have been paid from the appropriation made by the act of March 3, 1877. His appointment with salary was unauthorized. If it were necessary to consider whether the two offices held by the claimant were *incompatible* offices, the question would be interesting and important. As each office was held under and subject to the control of a different appointing power, the occupant of the two offices might not be able to obey the directions of the two different Departments employing him. But the right to compensation is settled by the act of June 9, 1879, (21 Stats., 8,) which provides:

"That the accounts of the *salaries* and disbursements of the United States Entomological Commission may be settled and allowed in the same manner and with the same effect as if the members and officers thereof had taken the oath required by law at the time they entered upon the performance of their duties: *Provided*, They shall have taken said oaths before the first day of July, anno Domini one thousand eight hundred and seventy-nine."

* Statutes which forbid or authorize pay for services usually employ appropriate words; for example, "allowance or compensation," "salary, pay, or emoluments." (Rev. Stats., 1764, 1765.) There may undoubtedly be provisions for the payment of "expenses," which authorize the employment of agents and payment for their services. But the intention of Congress is generally indicated in such provisions as to whether such payment is provided for. The act of March 3, 1877, (19 Stats., 356, 357,) after providing "for compensation of three commissioners, * * * office expenses," for the Hot Springs reservation, provides for "the expenses of a commission of three skilled entomologists," thus showing that, when compensation was intended to be given, it was provided for by a word clearly indicating that purpose. (See act March 3, 1879, 20 Stats., 394.)

This act is a legislative construction of the act of March 3, 1877. It recognizes accounts of the salaries of the commission. A legislative recognition of a right affirms and establishes the right. (*State vs. Miller*, 23 Wis., 634; 15 Op. Att.-Gen., 322.)

The Secretary of the Treasury will be advised to transmit the claim to the First Auditor to state an account and make a report to the First Comptroller, in order that the balance which is due the claimant may be reported to Congress under the act of June 14, 1878.

TREASURY DEPARTMENT,

First Comptroller's Office, December 26, 1881.

**IN THE MATTER OF THE AUTHORITY OF COMMISSIONERS
OF THE DISTRICT OF COLUMBIA TO PAY FOR EXTRA
SERVICES RENDERED BY A CLERK WHO RECEIVES A
A FIXED SALARY.—FISH'S CASE.**

1. A clerk in the office of the treasurer and assessor of the District of Columbia is an "officer" in a "branch of the public service" within the meaning of section 1765 of the Revised Statutes of the United States. (See act June 11, 1878, 20 Stats., 104; act March 3, 1879, 20 Stats., 405.)
2. Such clerk is not entitled to receive extra compensation from the Commissioners of the District of Columbia for services performed by him after regular office-hours.

R. A. Fish, a clerk in the office of the treasurer and assessor of the District of Columbia, with an annual salary of \$1,200, was paid by the Commissioners of the District \$101.10, the regular salary for the month of October, 1879, on one pay-roll, and on another \$80 as extra compensation for the time, from October 2 to 31, 1879, he was employed in "preparing tax-lists for 1880 after office-hours, by order of the Commissioners, October 2, 1879." Other clerks were paid in like manner.

The treasurer and assessor of the District of Columbia addressed, October 1, 1879, a letter to the Commissioners, in which he says that the tax-books "can only be prepared with any satisfaction by the four clerks who have them in charge, and the work can only be done at night, (under the usual compensation,) in order to have the books ready for the collector by November 1." An indorsement was, by order of the Commissioners, made on this letter, as follows: "Eighty dollars will be allowed each of the four clerks to prepare these tax-lists. No amount will be paid until the work is done to the satisfaction of the treasurer and assessor, and nothing whatever unless the tax-lists are ready at the time required in the law."

The work was done as directed, the clerks were paid, and the First

Comptroller is now required to decide whether the voucher for the \$80 paid to R. A. Fish can be credited to the Commissioners of the District in the settlement of their accounts.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The clerk in the office of the treasurer and assessor of the District of Columbia to whom the payment of \$80 was made is an "officer" in a "branch of the public service" within the meaning of section 1765 of the Revised Statutes of the United States. He is employed and renders service under the authority of Congress, and his salary is "fixed by law" at \$1,200. (Act March 3, 1879, 20 Stats., 405; Clerk's case, 1 Lawrence, Compt. Dec., 305; *Cox vs. United States*, 14 Ct. Cls., 513.)

The District is under a municipal government. The officers thereof derive their authority from appointments made pursuant to acts of Congress. They are therefore in the public service. Their status is not changed by the fact that one-half of the expenses of the District are paid from revenues collected from persons and property in the District, and the residue paid from other public moneys appropriated by Congress.

The act of June 11, 1878, (20 Stats., 104,) declares that the Commissioners of the District are authorized to "make appointments to any office under them authorized by law." Technically they cannot, under the Constitution, appoint *officers*. (Const., Art. II, sec. 2, cl. 2.) But persons appointed by them under the act of 1878 are employed in the public service, and may, for some statutory purposes, be regarded as officers. They are persons in the public service, with pay fixed by law or by regulations made pursuant to law.

The statute declares that "no officer in any branch of the public service, or any other person [in the public service] whose salary, pay, or emoluments are fixed by law or regulations, shall receive any * * * extra * * * compensation * * * unless * * *." (Rev. Stats. U. S., 1765.) The conditions under which such extra compensation may be paid do not exist in the present case. The purpose and policy of this prohibition against extra compensation in the absence of the specified conditions apply as well to the municipal government of the District of Columbia as to any other branch of the public service; and consequently it was unlawful to pay to Fish any sum in addition to his salary for "preparing tax-lists * * * after office-hours."

The Commissioners of the District cannot be allowed credit for such payments in the settlement of their accounts.

TREASURY DEPARTMENT,

First Comptroller's Office, December 21, 1881.

IN THE MATTER OF THE RIGHT OF A PERSON RECEIVING PAY AS CLERK FOR THE INTERNATIONAL SANITARY CONFERENCE TO COMPENSATION ALSO AS CLERK FOR THE NATIONAL BOARD OF HEALTH.—CHESNEY'S CASE.

1. The National Board of Health, under the acts of 1879, 1880, and 1881, prescribing its duties and making appropriations for its expenses, had incidental authority to employ necessary agents and employés to carry out the objects of the acts.
2. The stenographer appointed by said board was not an *officer*.
3. The clerk appointed by the Secretary of State for the International Sanitary Conference, if not an officer, was at least a person in the public service whose pay was fixed by statute.
4. The clerk so appointed, and while acting as such, could not, under section 1765 of the Revised Statutes, be lawfully paid for services as clerk or stenographer for the National Board of Health.

The National Board of Health was organized, appropriated for, and it has transacted business, under the authority of the acts and joint resolutions of March 3, 1879, (20 Stats., 484,) June 2, 1879, (21 Stats., 5,) July 1, 1879, (21 Stats., 46,) April 18, 1879, (21 Stats., 49,) June 14, 1879, (21 Stats., 50,) June 16, 1880, (21 Stats., 266,) and March 3, 1881, (21 Stats., 442.) The board consists of seven members, appointed by the President, by the advice and consent of the Senate, with compensation for each at ten dollars per day, besides officers detailed without pay. The board is authorized to hold sessions, to make necessary regulations, and to make examinations in the United States and at foreign ports, to obtain information on matters affecting public health, to advise on all questions submitted to it on matters tending to the improvement of public health, and to report to Congress a plan for a national public health organization. These acts appropriate money to carry out the objects of the board.

April 2, 1879, the board "ordered that the executive committee be empowered to employ a stenographer at a rate of pay not to exceed \$150 per month."

June 12, 1879, the board appointed C. S. Chesney "a clerk of class four in the office of the National Board of Health, with a compensation at the rate of \$1,800 per annum from the 1st instant." The accounts of W. P. Dunwoody, disbursing agent of the National Board of Health, show that during the quarter year ending March 31, 1881, he paid C. S. Chesney \$450 for services as clerk for the board for January, February, and March, 1881.

The joint resolution of May 14, 1880, (21 Stats., 306,) authorizes the

President "to call an International Sanitary Conference to meet at Washington * * * to which the several powers having jurisdiction of ports likely to be infected with yellow fever or cholera shall be invited to send delegates * * * for the purpose of securing an international system of notification as to the actual sanitary condition of ports and places under the jurisdiction of such powers and of vessels sailing therefrom."

The act of June 16, 1880, 21 Stats., 266,) appropriates a "sufficient amount to pay" the "salary of a clerk, who shall be a stenographer, to the International Sanitary Congress, * * * at the rate of six dollars per day while actually employed."

The act of March 3, 1881, (21 Stats., 415,) appropriates, "to enable the Secretary of State to meet the expenses of the International Sanitary Congress," \$5,000.

The accounts of R. C. Morgan, disbursing clerk, show that on March 15, 1881, he paid C. S. Chesney \$402 "for sixty-seven days' services as stenographer to the International Sanitary Conference, and subsequently thereto, at \$6 per day in bringing up the work." This sixty-seven days' service was rendered during January, February, and March, 1881. A letter from the State Department, August 31, 1881, to the Fifth Auditor, says: "It does not appear that C. S. Chesney was commissioned by this Department as stenographer to the late International Sanitary Conference. Mr. Chesney was designated by the Secretary of State as stenographer for the conference, his compensation to be at the rate of six dollars per diem, and it was not deemed necessary to have a formal commission issued."

The First Auditor having allowed credit to Disbursing Agent Dunwoody for the payment of \$450 to C. S. Chesney for services as clerk to the National Board of Health during January, February, and March, 1881, and the Fifth Auditor having previously allowed credit to Disbursing Agent Morgan for the payment of \$402 to Chesney for services during the same period as stenographer to the International Sanitary Conference, and the latter credit having been allowed by the First Comptroller, the question now arises whether Chesney is entitled to receive compensation for the services rendered as clerk to the National Board of Health?

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

Though no authority is given in specific terms to the National Board of Health or to the head of any Department to appoint a clerk or other person as an *officer* under the Board, the authority of the Board to engage agents and pay them such compensation as it would fix in its

discretion, or as should be fixed under "regulations" duly prescribed, is clearly implied. (Inspectors' case, 1 Lawrence, Compt. Dec., 203; Eveleth's case, *ante*, 20.)

During the time Mr. Chesney served as stenographer to the International Sanitary Conference, he may possibly be regarded as an *officer*. (U. S. *vs.* Germaine, 99 U. S., 512; U. S. *vs.* Moore, 95 U. S., 760; United States *vs.* Maurice *et al.*, 2 Brock. C. C., 97; Herndon's case, 1 Lawrence, Compt. Dec., 49; Collins's case, 14 Ct. Cls., 568; Collins's case, 15 Ct. Cls., 22.) But, whether so or not, he was a *person* in the public service whose pay was "fixed by law." The act of June 16, 1880, fixed his pay at \$6 per day. During the time that he served in this capacity, and at this rate of pay, he was forbidden by law to "receive any additional pay, extra allowance, or compensation, in any form whatever * * * for any other service or duty whatever, unless the same is [was] authorized by law, and the appropriation therefor explicitly states [stated] that it is [was] for such additional pay, extra allowance, or compensation." (Rev. Stats., 1765.) He could not, therefore, lawfully receive any compensation as clerk for the National Board of Health. As such clerk he was not an officer. He was not appointed by the head of a Department. (Const., Art. II, sec. 2, cl. 2; United States *vs.* Maurice *et al.*, 2 Brock. C. C., 97; U. S. *vs.* Germaine, 99 U. S., 508; Herndon's case, 1 Lawrence, Compt. Dec., 49.) He did not hold the appointment to two offices.

The compensation paid for sixty-seven days of the period of service for the National Board of Health cannot be allowed.

TREASURY DEPARTMENT,

First Comptroller's Office, December 23, 1881.

IN THE MATTER OF THE RIGHT OF A PARTY TO RECEIVE, UNDER EMPLOYMENT BY A COLLECTOR OF INTERNAL REVENUE, COMPENSATION FOR SERVICES RENDERED PURSUANT THERETO, IN ADDITION TO COMPENSATION EARNED BY HIM AS DEPUTY MARSHAL.—BROWN'S CASE.

1. Inasmuch as a deputy marshal is not an *officer*, nor other person whose pay is "fixed by law or regulations," and is not charged by law with the duty, under the authority of the Commissioner of Internal Revenue, of seizing or destroying any distillery or apparatus used to defraud the Government, or of ascertaining the location thereof, he may be lawfully employed and paid for such services.
2. When the compensation, salary, fees, or emoluments of a public office or employment are fixed by law or regulations, the amount to be paid the officer or employé for any given time is ascertainable, upon that basis only, by the proper accounting officers of the Treasury.

3. The compensation of deputy marshals is fixed by contract between them and the marshal. The law and the regulations made thereunder merely prescribe a limit which shall not be exceeded in such contract.

Section 841 of the Revised Statutes provides, in relation to the compensation of the marshal, for "a proper allowance to his deputies," which "allowance to any deputy shall in no case exceed three-fourths of the fees and emoluments received or payable for the services rendered by him, and may be reduced below that rate by the Attorney-General, whenever the returns show such rate to be unreasonable." The "instructions to marshals, attorneys, and clerks of the United States courts, adopted by the Attorney-General" under the act of June 22, 1870, (16 Stats., 162, sec. 15; Rev. Stats., 368,) prescribe, pursuant to section 3 of the act of February 26, 1853, (10 Stats., 166; Rev. Stats., 841,) that "if three-fourths of his [the deputy marshal's] earnings, including clerical services, exceed three thousand dollars, [per annum,] the allowance will be limited to that amount."

John V. L. Brown was a deputy marshal in the judicial district of Kentucky during the whole period of the first half of the calendar year 1881. The emolument return of the marshal for said period shows that Brown was paid for his services as deputy marshal \$1,500. In an affidavit on file in this case, Brown says: "According to the regulations, if I do over \$1,500 worth of work, [during the half calendar year,] I am only entitled to \$1,500 * * * and in the six months [ending June 30, 1881] including February and March I did over \$3,500 worth of work, and only was allowed \$1,500 * * *." From the foregoing it appears that Brown received for said six months the highest rate of compensation which could have been allowed to him by the marshal under the regulations adopted by the Attorney-General.

During the months of February and March, 1881, Brown was employed by W. J. Landram, collector of internal revenue for the eighth district of Kentucky, pursuant to authority of the Commissioner of Internal Revenue, for the special purpose of locating and raiding illicit distilleries; and compensation for the service to be rendered was fixed at the rate of \$75 per month, and \$5 additional for each still destroyed. It appears that, with the exception of seven days in March, he rendered full service for the two months in which he was employed by the collector, and that seventeen illicit stills were destroyed.

April 5, 1881, Brown made out a bill in the form of a receipt to the collector, for compensation for service in locating and seizing illicit stills during the months of February and March, 1881, \$150, and for an allowance, at \$5 each, for the stills destroyed, \$85; in all, \$235.

April 14, 1881, the collector rendered to the Commissioner of Internal

Revenue a "miscellaneous expense account" for \$1,028, of which Brown's bill for \$235 formed one of the items.

It having been shown that Brown rendered service as a deputy marshal on the 2d, 3d, 9th, 11th, 24th, 25th, and 29th of March, 1881, and that during these days he had earned, as such deputy, \$74.98 as fees, and incurred expenses in the sum of \$10, the Commissioner deducted the amount of these fees and expenses, \$84.98, from his bill, and approved the collector's account for \$929.02, November 1, 1881. The account, with the vouchers, was referred to the Acting Secretary of the Treasury, who approved it in the amount allowed by the Commissioner, and referred it to the Fifth Auditor for adjustment. November 5, 1881, the Fifth Auditor adjusted the account, per Report No. 30912, and found a balance of \$929.02 to be due and payable to William J. Landram, collector. The Auditor's statement and vouchers therewith were then "transmitted for decision of the First Comptroller of the Treasury thereon."

On the facts shown the questions arise: Can Brown be paid for the services rendered in his employment under the collector? and, if so, what amount should he be paid?

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

A person engaged in distilling spirits who defrauds the United States of the tax on the spirits, forfeits the distillery and the apparatus used by him, and is subject to fine and imprisonment. (Rev. Stats., 838, 3213, 3215, 3257.)

Distilling apparatus may be seized for violation of the law; and when such apparatus is of certain limited capacity and value, it may also be destroyed when it is impracticable to remove it to a place of safe storage. (Rev. Stats., 3332; Act March 1, 1879, 20 Stats., 339.)

Any "officer of internal revenue may be specially authorized by the Commissioner of Internal Revenue to seize any property which may by law be subject to seizure." (Rev. Stats., 3166, 3453.)

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to secure the services of employes for "detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws," (Rev. Stats., 3463,) "or accessory to the same," and to make payment for the same, or for "information and detection." (Act June 15, 1881, 21 Stats., 220.) This authority is not affected by the restriction in section 3152 of the Revised Statutes.

Neither the marshal of a judicial district nor his deputy is charged with the duty of seizing or destroying any distillery or apparatus described in the act of March 1, 1879, nor in ascertaining the location thereof. It is the duty of marshals and deputies, when authorized by process, to arrest distillers and others guilty of crime in violating the internal-revenue laws, and also, in certain cases, to receive from the collector and take into custody goods seized before issue of process therefor. (Rev. Stats., 787, 788, 3257, 3258, 3453, 3458.)

Section 1765 of the Revised Statutes provides that—

“No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.”

There is no law or regulation which prescribes or fixes the compensation to be paid a person temporarily employed by a collector of internal revenue for the purpose of locating and raiding illicit distilleries; hence, the right to compensation in this case depends upon the construction to be given to the above section. Can Brown as deputy marshal, in addition to his pay as such, receive compensation for services rendered by him in locating and raiding illicit distilleries?

When the compensation, salary, fees, or emoluments of a public office or employment are fixed by law or regulations, the amount to be paid the officer or employé for any given time is ascertainable by the proper accounting officers under the rule laid down in the law or regulations. For example, the law allows the marshal a salary of \$200 and certain fees, and limits the amount of his annual compensation to \$6,000. If the fees prescribed for the services rendered in any year amount to \$10,000, the marshal will be entitled to only \$5,800 thereof for his personal compensation. If the fees for the services rendered in a year amount to only \$5,800, the marshal will be entitled to all the fees. In both cases the amount of compensation is fixed by law. In the former case, the marshal can compensate his deputies, under the limitation of the regulations, from the \$4,200 surplus fees; in the latter case, he must pay them from his own personal compensation of \$6,000. In the former case, again, the marshal, in accounting for the \$4,200 surplus fees, cannot receive credit for such part thereof as has been paid to his deputies until the agreements made with them in respect of compensation are ascertained. These are, in practice, shown by implication from the receipts given by them to the marshal. If he had two deputies and paid one \$2,000 and the other \$2,200, it is clear that these amounts

could not have been ascertained by the accounting officers under the law or regulations, and that the right to be paid such amounts depends solely on the contracts made with the deputies. If one deputy is to be paid \$3,000 and the other \$1,200, the right to payment would still accrue from contract, for neither the law nor the regulations say that any deputy shall, of right, receive either of those amounts in compensation for service. The contract alone fixes the right. The law and regulations merely prescribe a limit which shall not be exceeded in the contract.

A deputy marshal is not an officer, nor is he a person in "the public service * * * whose salary, pay, or emoluments are fixed by law or regulations" within the meaning of section 1765 of the Revised Statutes; therefore, nothing contained in that section prohibits payment to Brown for the services rendered by him in his employment under the collector. (Reward case, *post*, 545; Herndon's case, 1 Lawrence, Compt. Dec., 55; Landram's case, 16 Ct. Cls., 74.)

In approving the collector's account the Commissioner deducted from the bill rendered by Brown the amount of fees earned by him as deputy marshal in seven days in March, 1881, and also the amount of expenses incurred in that capacity during that time; in all, \$84.98. As Brown's bill called only for monthly compensation at \$75 per month and \$5 for each still destroyed, the deduction of the \$10 for expenses incurred by him as deputy marshal would certainly seem to be erroneous; and as it appears that he rendered service for the full period of two months, excepting only seven days thereof, under his appointment by the collector, it would also seem that he was entitled to be paid at the rate of \$75 a month for two months, less seven days; that is to say, $\$150 - \$16.93 + \$85 = \218.07 .

The account as approved and stated will be allowed.

TREASURY DEPARTMENT,

First Comptroller's Office, December 27, 1881.

IN THE MATTER OF THE RIGHT OF A DEPUTY MARSHAL,
COMMISSIONED ESPECIALLY FOR THAT SERVICE, TO A
REWARD OFFERED FOR RE-ARRESTING AN ESCAPED
PRISONER CHARGED WITH CRIME.—REWARD CASE.

1. The oath of office of every marshal and deputy requires him to "*faithfully execute all lawful precepts directed to the marshal of the district * * * and in all things well and truly * * * perform the duties of the office.*" A promise to pay a reward to a marshal for the performance of a duty required by law is void, as being against public policy.
2. Section 788 of the Revised Statutes confers upon marshals and their deputies the same powers, in each State, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof. The marshal of each district has power to command all necessary assistance in the execution of his duty.
3. It is a violation of duty, and of the oath of office of a marshal or deputy, to neglect to execute faithfully a warrant of arrest, and a crime to voluntarily suffer to escape any prisoner in custody by virtue of process. Every marshal, or any person, may, on probable suspicion of the commission of a felony, arrest, without warrant, the suspected offender.
4. The statute, in charging a marshal in such case with the duty of making an arrest, and in prescribing the fees and compensation to be paid therefor, excludes, by necessary implication, the right to any other reward for that service. That which is expressed puts an end to that which is implied: *expressum facit cessare tacitum*.
5. A deputy marshal does not, in this respect, occupy the position of a marshal as regards the right to a reward; he is not an "officer" in the service of the Government; he is the employé of the marshal. The marshal and his sureties are liable for the defaults of deputies.
6. Deputies are to be paid by marshals such sums as may be agreed upon, not exceeding "three-fourths of the fees and emoluments received or payable for the services rendered" by them. The Government deals and settles directly with the marshals.
7. The deputy marshal is, in contemplation of law, entitled to compensation for his services; but when he is paid by the marshal for a particular service, it is the policy of the law that he shall not be again paid from the Treasury for the same service.
8. The amount which may be paid to a deputy marshal for his services as the employé of the marshal is limited by statute. But it cannot be said that, within the meaning of section 1765 of the Revised Statutes, his "pay or emoluments are fixed by law or regulations." They are fixed by contract.
9. A contract to pay a reward for the arrest of a felon is valid if not made with a public officer or employé on whom the law imposes the duty of making such arrest, or with some officer or employé otherwise excluded from the right to receive such reward.
10. A private citizen who is commissioned as deputy marshal for the special purpose of rearresting an escaped prisoner, for whose rearrest and confinement the

Commissioner of Internal Revenue has, with the approval of the Secretary of the Treasury, offered a reward, is not deprived by such commission of his right to the reward upon rendition of the service.

11. The promise of a reward, upon which such commission was accepted, created a contingent right, which became absolute by performance of the service. It was then property created by contract; and such contract was not nullified by the appointment as deputy marshal.

November 8, 1879, Hutsell Amarine, imprisoned in jail at Knoxville, Tenn., and awaiting trial on a charge of forcibly obstructing Deputy Internal Revenue Collector Cooper, of the second collection district of that State, in the performance of official duty, August 9, 1878, resulting in his (Cooper's) death, escaped.

December 1, 1879, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, offered a reward of \$250 for the re-arrest and confinement of Amarine, and he instructed the collector of the second district of Tennessee to offer it. This officer communicated the offer to the internal-revenue collector at Galveston, Tex., who ascertained that Amarine was somewhere in Brazoria County, of that State. The collector procured from the judge of the district court of the United States for the eastern district of Texas a bench-warrant to arrest Amarine, and "procured a commission as United States deputy marshal for William H. Sharp, especially for him to make this arrest," under which Sharp, a resident of the county, arrested Amarine therein, November 5, 1880, and on the next day delivered him to the United States marshal of said eastern district. On November 9, Amarine was taken before the judge of that district, and under his order was returned to the eastern district of Tennessee.

February 8, 1881, the Commissioner of Internal Revenue transmitted, with his approval, to the Secretary of the Treasury the claim of Sharp for reward of \$250, which was approved by the Secretary, and referred, February 11, 1881, to the Fifth Auditor for examination and settlement.

February 14, 1881, the Fifth Auditor reported to the First Comptroller that the sum of \$250 is due from the United States to Sharp.

February 15, 1881, the Acting First Comptroller rejected the claim.

November 25, 1881, the Commissioner of Internal Revenue requested a reconsideration of the decision made. He says: "The law does not, as I understand, impose upon these officers [marshals] the duty of ferreting out and hunting down criminals who flee into their territory from other States." The claim was, on proper evidence, opened for reconsideration.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

Although the last clause in section 1014 of the Revised Statutes applies in terms only to the case of an offender or witness actually under commitment in a district other than that where the offence is to be tried, it may, doubtless, be construed as extending to the case of a person brought before a district judge of the United States in the first instance, on arrest, and whose offence appears on examination to have been committed in another district. When, therefore, a person accused or indicted in any district is at large in another district, application is to be made at once to the judge of the latter district for his arrest and removal. (Conkling's Treatise, 3d ed., p. 630; Rev. Stats., 879, 1014.)

It does not in exact terms appear, but from the papers submitted it may be fairly inferred, that the collector in Texas informed Sharp of the offered reward, and arranged that the latter, in the expectation of procuring it, should search for, and, if possible, arrest the fugitive; *after* which the appointment of Sharp as deputy was made, merely as a means of arming him with evidence of official authority to make the arrest, and not with a view to become a deputy for business generally. It is shown that Amarine was a dangerous character, and was, when arrested, found living in a little hut by the side of a canebrake.

The oath of office of every marshal and deputy requires him to "*faithfully* execute all lawful precepts directed to the marshal of the district, * * * and in all things well and truly * * * perform the duties of the office." (Rev. Stats., 782.) The duty of a marshal to execute throughout the district "all lawful precepts" is prescribed in section 787 of the Revised Statutes; and section 788 confers upon marshals and their deputies the same powers in each State, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof. The marshal of each district has power to command all necessary assistance in the execution of his duty. (Rev. Stats., 787, 2024; 6 Op. Att.-Gen., 466; 16 Op., 162.) If a crime be committed in one district, and the offender escape into another, a warrant of arrest may issue in the latter, and it is the duty of the marshal therein to execute it, and to execute a warrant for the removal of the accused to the district where the trial is to be had. (Rev. Stats., 1014.) The marshal is entitled to the prescribed fees "for service of any warrant," and "for travel, in going only, to serve any * * * warrant." He is also entitled to be paid "for expenses while employed in endeavoring to arrest, under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars a day, in addition to his compensation for service and travel." (Rev. Stats., 829.) Provision is

made to pay salaries to marshals "as a compensation for *extra services*." (Rev. Stats., 781.) It is made a crime to obstruct, resist, oppose, or assault a marshal or "any officer or other person duly authorized in serving," or attempting to serve, any warrant. (Rev. Stats., 5398.)

It is a violation of duty and of the oath of office of a marshal or deputy to neglect to execute faithfully a warrant of arrest, and a crime to voluntarily suffer to escape any prisoner in custody by virtue of process. Every marshal, or any person, may, on probable suspicion of the commission of a felony, arrest without warrant the suspected offender. (Crocker on Sheriffs, p. 34, sec. 49; *Farrell vs. Warren*, 3 Wend., 253; *Burns vs. Erben*, 40 N. Y., 463; *Burke vs. Bell*, 36 Me., 317; *Com. vs. McLaughlin*, 12 Cush., 615; *Wexford vs. Smith*, 2 Root, 171; *Kent vs. Gray*, 1 Root, 66; *Eanes vs. State*, 6 Humph. Tenn., 53; *Holley vs. Mix*, 3 Wend., 350.)

It is important to the public service that the law on this subject should be understood, first, with reference to marshals, and, secondly, with reference to deputies. There are three reasons, each conclusive, against the right of a *marshal* holding process for the arrest of a party accused of crime to receive or be paid a reward offered for that purpose.

I.—The statute, in charging a marshal in such case with the duty of making an arrest, and in prescribing the fees and compensation to be paid therefor, excludes by necessary implication the right to any other reward for that service. That which is expressed puts an end to that which is implied. *Expressum facit cessare tacitum*. (Broom's Legal Maxims, 7th ed., 666; *Birch's case*, 1 Lawrence, Compt. Dec., 154; *Reporter's case*, *Id.*, 307.)

A deputy marshal does not occupy, in this respect, exactly the position of a marshal as regards the right to receive a reward. A deputy is not an "officer" in the service of the Government, as will be hereafter shown; he is the employé of the marshal. (Rev. Stats., 780, 841; *Herndon vs. United States*, 15 Ct. Cls., 446; *Herndon's case*, 1 Lawrence, Compt. Dec., 45.) The statute gives salary and fees to marshals, but not to deputies. (Rev. Stats., 781, 829, 830, 841.) The marshal and his sureties are liable for the defaults of deputies. (Rev. Stats., 783, 784, 789, 2189.) Deputies are to be paid by marshals such sums as may be agreed upon, not exceeding "three-fourths of the fees and emoluments received or payable for the services rendered" by them. (Rev. Stats., 833, 841.) The Government deals and settles directly with the marshals. (Rev. Stats., 841.)

The deputy marshal is, in contemplation of law, entitled to compensation for his services; but when he is paid by the marshal for a par-

ticular service, it is the policy of the law that he shall not be again paid from the Treasury for the *same* service. It has been said that “a thing may be within the letter of the statute, and not within its meaning; and it may be within the meaning, though not within the letter.” (United States *vs.* Moore, 95 U. S., 763; Slater *vs.* Cave, 3 Ohio St., 85; 9 Bac. Abr., 244; United States *vs.* Babbit, 1 Black, 55.) So, a person acting under the authority of law may be within the policy, when not within the exact letter, of the legal axiom that what is expressed renders ineffective that which is implied.

II.—The right of a marshal to receive a reward for any service, extra or otherwise, without the approval of Congress, is denied by this provision of law:

“No *officer* in any branch of the public service, or *any other person* whose salary, pay, or emoluments are *fixed by law* or regulations, shall receive any *additional pay, extra allowance, or compensation, in any form* whatever, for the disbursement of public money, or *for any other service or duty whatever*, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.” (Rev. Stats., 1765.)

This prohibition excludes the right to such additional pay, extra allowance, or compensation, as well when the service or duty pertains to the office held by a person as when it pertains to some *other* office or official service. This provision is not to be read as declaring only that an officer shall not receive additional pay, extra allowance, or compensation “for any other service or duty” than that which is outside of his office. He cannot, without the express assent of Congress, receive extra pay for either official or unofficial services. This is the fair meaning of the words employed in the statute. Its manifest *purpose* requires this construction. A practice had grown up by which, under general appropriation acts, officers charged with expending the appropriations, and with clearly implied authority to appoint disbursing agents, conferred upon other officers who were in receipt of fixed salaries or compensation the authority to make disbursements thereof, and to charge commissions for their services in making such disbursements. This practice enabled executive officers to allow compensation for services not pertaining to the offices held by those who made such disbursements. The allowance of extra compensation, at the discretion of heads of Departments, to officers and others in the public service for official or other services, became an evil which Congress corrected by the sweeping prohibition contained in section 1765 of the Revised Statutes. This prohibition is applicable to any *service* pertaining to an office

held by a person, to employment of a character not official, and to extra services performed out of regular office-hours in such office or employment, as well as to services in some other office or employment. The expression "additional pay, extra allowance, or compensation" was intended to cover all compensation not prescribed by statute or regulations for an officer for the performance of his official duties, or for another person having duties to perform in the public service. And the statute excludes the right of such officer or person to receive such additional pay, extra allowance, or compensation, whether for the service required by the office or other employment, or for service not connected with such office or employment. This construction of the statute is consistent with that given to other statutes which are similar in terms. (*Hatch vs. Mann*, 15 Wend., 44; *Gregg vs. Pierce*, 53 Barb., 390; *Parker vs. Newland*, 1 Hill, 87; *Harp vs. Osgood*, 2 Hill, 216.)

The right of a person holding two distinct commissions as an officer to receive the salary of both offices is, of course, conceded, since the proviso to section 1 of the appropriation act of September 30, 1850, (9 Stats., 542,) is not found in the Revised Statutes. (Rev. Stats., 5596.)

The construction thus given to section 1765 of the Revised Statutes denies the right of a *marshal* to receive for any "service or duty whatever" a *reward* beyond the salary and fees prescribed by statute.

It seems probable that this section does not apply to *deputy marshals*. The statute incidentally denominates a deputy marshal an "*officer*." (Rev. Stats., 780, 782, 789, 790.) It is possible that within the meaning of some provisions of the statute he may be so regarded. (*United States vs. Tinklepaugh*, 3 Blatchf. C. C., 430.) But as he is appointed by the marshal, he is in no technical, constitutional sense an *officer*. (Const., Art. II, sec. 2, cl. 2; *United States vs. Germaine*, 99 U. S., 508; *Herndon's case*, 15 Ct. Cls., 446; *Herndon's case*, 1 Lawrence, Compt. Dec., 49.) The amount which may be paid to him for his services as the employé of the marshal is *limited* by statute. (Rev. Stats., 833, 841.) But it cannot be said that, within the meaning of section 1765 of the Revised Statutes, his "pay or emoluments are fixed by law or regulations." They are fixed by contract. (*Herndon's case*, 1 Lawrence, Compt. Dec., 55; *Landram's case*, 16 Ct. Cls., 74.)

III.—A promise to pay a reward to a marshal for the performance of a duty required by law is void, as being against public policy. If marshals are induced to believe that delay in making arrests or the omission to exercise vigilance in so doing will bring rewards, a premium is thus offered for official delinquency. Whatever encourages or invites

official delinquency is *contra bonos mores*, and violative of public policy. No right can arise out of a contract which contravenes public policy. (Broom, Leg. Max., 7th ed., 732; Wood's case, 1 Lawrence, Compt. Dec., 8; Stotesbury *vs.* Smith, 2 Burr., 924; England *vs.* Davidson, 3 P. & D., 594; Stamper *vs.* Temple, 6 Humph. Tenn., 113; Pool *vs.* Boston, 5 Cush. Mass., 219; Means *vs.* Hendershott, 24 Iowa, 78; Pilie *vs.* New Orleans, 19 La. Ann., 274.)

It was once held that on general equity principles an officer was not denied the right to receive a reward beyond the salary or fees prescribed by law, when he had made "extraordinary efforts beyond those which an officer is strictly bound to make, or which could be legally required of him." (City Bank *vs.* Bangs, 2 Edwards, 98; Hatch *vs.* Mann, 9 Wend., 262. See 13 Op. Att.-Gen., 228, 369; 18 Stats., 186–191.) But this doctrine was overruled in Hatch *vs.* Mann, 15 Wendell, 44, in which it is said of Lord Bacon that it was for "receiving gratuities for making extraordinary efforts to discharge his official duty" that he was "impeached, fined, imprisoned, degraded, and disgraced," and earned the epitaph of "the wisest, brightest, meanest of mankind."

No principle of law or of ethics is more firmly established than that which declares that an officer may not contract for a reward, in addition to the compensation allowed by law, for the performance of official duty. This principle applies as well to employes charged with the performance of official duties as to the incumbents of offices. It is applicable to deputy marshals, who, though not technically officers, perform the duties of an officer—the marshal—and receive compensation therefor under authority of law. (See Rev. Stats., 5451, 5501; 18 Stats., 186–191.)

Without impairing any provision of any statute, or any principle stated, the claimant is, nevertheless, on sound legal principles, entitled to be paid the reward he claims.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, had authority to offer the reward. (Rev. Stats., 321, 3152, 3463; 20 Stats., 328, 413; 21 Stats., 23; Briggs's case, 15 Ct. Cls., 54.)

It is well settled that a contract to pay a reward for the arrest of a felon is valid if not made with a public officer or employé on whom the law imposes the duty of making such arrest, or with some officer or employé otherwise excluded from the right to receive such reward. (Wood's case, 1 Lawrence, Compt. Dec., 8; Briggs's case, 15 Ct. Cls., 54.)

It was competent, therefore, for the claimant, before he became a deputy marshal, and thereby assumed the duty of arresting Amarine, to make a contract to search for and, if possible, arrest that fugitive

from justice. In effect, he made such contract, and in consequence he was appointed a deputy marshal, not on his own application, but on the application of the collector in Texas, merely in aid of the service he had agreed to perform. He might have made the arrest equally well without the appointment as deputy. When the original engagement was made with the collector, who was authorized to secure the services, (Act March 1, 1879, 20 Stats., 328,) the claimant had the promise of a reward. This promise created a contingent right, a right which became absolute by performance on the part of the claimant. It was then property created by contract. It was *not* "a mere contingent possibility not coupled with an interest." (1 Pars. Cont., 523.) It is well settled that "if rights are vested, or possibilities are distinctly connected with interest or property, they may be sold." (1 Pars. Cont., 523; *Jones vs. Roe*, 3 Term R., 88.) The contract with the claimant vested in him a right which could not be divested except by "due process of law." (Const. U. S., Art. I, sec. 10, cl. 1; Art. V, Amendments.) The arrest was made in pursuance of this contract. The rights created by the contract could not be divested by the act of the collector in procuring the appointment of the claimant as deputy marshal, as an employé of the marshal. In making the arrest the claimant was not, in any proper sense, or by his assent, in the service of the marshal. His act was that of a citizen fulfilling an engagement which was independent of the deputyship. This view is supported by the case of *Gregg vs. Pierce*, 53 Barbour, 387. In that case it appeared that a party convicted of felony in Chemung County, N. Y., but being at large on bail, fled to Illinois. A reward was offered by his bail generally for his arrest and return to New York, and particularly to the sheriff of said county, who undertook to perform the service, and, under a requisition procured from the Governor of New York on the Governor of Illinois, pursued, arrested, and returned the fugitive. The statute of New York prohibited all compensation to officers except "such as is or shall be allowed by the laws of the State." The court held that this statute did not affect the claim for reward; that the fact that the claimant was sheriff added nothing to his authority; that he must be deemed to have made the arrest as a private citizen, and that the promise of a reward related to the "thing to be done, and not to the manner of doing it." (See Rev. Stats. U. S., 5278, 5279.)

The claimant is entitled to the offered reward, and a balance will accordingly be certified in his favor.

TREASURY DEPARTMENT,

First Comptroller's Office, December 28, 1881.

IN THE MATTER OF THE AUTHORITY OF THE ACCOUNTING OFFICERS OF THE TREASURY TO ALLOW CREDIT TO A DISBURSING OFFICER FOR LOSSES OF PUBLIC MONEYS THROUGH FAILURE OF A DESIGNATED DEPOSITARY.—HOBBS'S CASE.

- 1 It is a reasonable proposition that a disbursing officer who, in good faith, lawfully deposits public money with a designated depositary is not chargeable therewith in case of the default of the latter.
- 2 Some matters determined by the First Comptroller may, perhaps, be reopened by order of the Secretary of the Treasury—*e. g.*, when a claim against the United States is rejected, and no balance has been certified in respect of such claim, section 191 of the Revised Statutes may not apply to the action taken thereon.
- 3 The act of June 23, 1870, (16 Stats., 166,) which authorized accounting officers to allow credits, in such cases as might be deemed just and reasonable, to military and naval disbursing officers for losses of funds during the rebellion, gave cumulative grounds of relief, but it did not take from accounting officers any previously-existing jurisdiction.
- 4 Similarly, the statutes which confer jurisdiction on the Court of Claims do not deprive the accounting officers of the Treasury of any jurisdiction previously conferred on them by statute.
- 5 When the First Comptroller has duly certified a balance against a disbursing officer, charging him with money by him deposited in a public depository, and lost, without fault or neglect of the officer, by the failure of the depository, the balance certified is final and conclusive on the executive branch of the Government, and the account on which it was certified cannot be reopened.
- 6 The successor in office of the Comptroller so certifying cannot, therefore, on the application of such disbursing officer, review the action so taken, and give credit in a subsequent settlement for an item rejected by his predecessor in office.

July 15, 1866, Thomas J. Hobbs, disbursing clerk, Treasury Department, rendered to the Fifth Auditor an account current for the quarter year ending June 30, 1866, "on account of expenses of the Office of the Internal Revenue," &c., in which, among others, the following items appear:

- | | |
|--|----------|
| 1 By warrant on the Treasurer, No. 703..... | \$25,200 |
| 2 To amount of Treasury warrant, No. 703, April, 1866, deposited in the Merchants' National Bank, a Government depository, in compliance with law. The bank having failed before any of the money had been drawn, and the amount being unavailable, this credit is claimed, and request made that a corresponding debit be raised against the bank | |
| | \$25,200 |

September 27, 1866, the Fifth Auditor examined and adjusted this account, per Report No. 41743, and found a "balance due the United

States, with which he [Thomas J. Hobbs] is to be charged, \$25,381.57." The report charges Mr. Hobbs with the amount of the warrant referred to, and the credit claimed was not allowed by the Auditor. It thus appears that, of the balance found due, \$25,200 arose from the disallowance by the Auditor of the credit claimed.

November 21, 1866, the Comptroller passed upon this account thus:

"I admit and certify that twenty-five thousand three hundred and eighty-one and $\frac{57}{100}$ dollars are due from Thomas J. Hobbs, disbursing clerk, to the United States, as stated in the foregoing report.

"R. W. TAYLER,
"Comptroller."

October 30, 1871, the Hon. George S. Boutwell, Secretary of the Treasury, addressed a letter to Mr. Tayler on the subject of this charge, in which he said:

"As the loss referred to occurred before the passage of the act of June 14, 1866, which requires all moneys intrusted for disbursement to United States disbursing officers, deposited in this city, to be deposited with the Treasurer of the United States, it would appear to be proper that Mr. Hobbs receive credit for the amount of his loss by the failure of the Merchants' National Bank.

"I will thank you, therefore, if you agree with me as to the propriety of this course, to cause an account to be stated, crediting Mr. Hobbs with the sum of \$25,200, due from him on account of 'salaries of Commissioner, (Int. Rev.) clerks, &c., prior to July 1, 1870, and charging the same to the Merchants' National Bank.' Please advise me of your action, and oblige."

To this request the Comptroller replied:

"It has not, to my knowledge, been regarded as within the powers of the accounting officers to credit disbursing officers except for moneys properly disbursed and for moneys restored to the Treasury. They are not authorized to allow credit for moneys lost without fault of the officer, not even though he be captured by the enemy and the money seized as captured. The authority to allow such claims was in Congress alone, which retained exclusive jurisdiction, until the passage of the act of May 9, 1866, (14 Stats., 44,) when jurisdiction in such cases was conferred upon the Court of Claims. * * * I am of the opinion that Mr. Hobbs can obtain relief only by application to Congress or to the Court of Claims." (See Rev. Stats., 1059, 1062.)

The assets of the bank paid dividends which reduced the deficit to \$18,715.11 at the time of the usual examination of the accounts of Mr. Hobbs in November, 1881, besides which he has surplus money in his hands, \$20.24.

December, 12, 1881, Mr. Hobbs addressed a letter to the First Comptroller, asking to be relieved "by the statement of an account crediting [him] with the amount now standing against" him, and "charging the same to the bank."

Thomas J. Hobbs, in person, submitted an argument to the following effect:

1. The Merchants' National Bank was at the time the deposit was made, and also at the time of its failure, a Government depository. The act of March 3, 1857, sec. 3, (11 Stats., 249,) authorized the deposit made with the Merchants' National Bank. The authority to make such deposits continued until the passage of the act of June 14, 1866. (14 Stats., 64.)

2. A disbursing officer should not be held liable for money lost by the failure, without his fault, of a bank in which the law authorized him to deposit it.

3. The Second Comptroller credited, on the dates set forth, the following-named disbursing officers, who had deposits in the Merchants' National Bank of Washington at the time it failed, with the amounts of their respective deposits: D. N. Cooley, Commissioner of Indian Affairs, January 25, 1867; Army Paymasters, Gardner, December 9, 1873; Hodge, March 7, 1872; Pool and Potter, 1872; Paulding, 1874; Rochester, 1871; Stewart, 1872; and Taylor, 1872; and Quartermaster Robinson, 1876.

4. In the year 1861, Quartermaster-General M. C. Meigs, then a captain of engineers, and disbursing officer, had money to his credit with the assistant treasurer at New Orleans, which money was seized by or turned over to the Confederate Government, in consequence of which his drafts on the assistant treasurer were not honored, and the drafts were, under the Army regulations, charged to him in the settlement of his account. In February, 1866, this officer addressed a letter to the Secretary of the Treasury, requesting to be relieved from the charges made against him. The letter was referred to the Second Comptroller, in whose office Army accounts are revised, and, February 15, 1866, he replied to the Secretary as follows:

"Under the erroneous impression that the accounting officers have not authority to comply with his request and relieve him from the charges without special instructions from the Secretary of the Treasury, General Meigs appeals to you for relief. Upon the case I have now respectfully to say that, almost immediately after my late appointment as Second Comptroller, a case precisely analogous, which had been left undisposed of by my predecessor, was decided by me, and the disbursing officer relieved. The ground taken then was, substantially, that the disbursing officer could not legally or equitably be held for the non-payment of his drafts, if such non-payment was the result of the laches or crime of another.

"A disbursing officer, having paid for only such purchases or services as are authorized by law, and drawn against funds placed to his credit, either in conformity with the first section, act of March 3, 1857,

or by special order of the Government, and having properly accounted for all the public money of which he actually had control, has discharged his duty, and the Government has, in respect to his money accounts, no further legal claim on him. * * * Upon such showing he cannot justly be held to further liability in the premises, and, in my opinion, an account should be stated, bringing to his credit the amount of the above-named drafts which have been charged to him."

This opinion was sent by the Secretary of the Treasury to the Third Auditor, who stated an account relieving General Meigs

5. The error made by the former First Comptroller consisted in treating this as a case where an indebtedness is to be crossed off the books of the Treasury for funds lost or captured from the person or custody of a disbursing officer; instead of which, it is merely a question of making a transfer statement on the books charging the party held responsible by the law and relieving me.

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

It seems that the claimant had for the case presented an ample remedy in the Court of Claims. The question whether he may yet pursue that remedy, or whether it is barred, is not pertinent here. (*United States vs. Clark*, 96 U. S., 37; s. c., 11 Ct. Cls., 702.) The remedy in the Court of Claims for losses of public money advanced to disbursing officers extends to other cases than those in which relief is sought by reason of the felonious or forcible taking of the public money, without the fault of the officer charged with its custody. (*Prime vs. United States*, 3 Ct. Cls., 209; *Pattee vs. United States*, *Id.*, 397; *Murphy vs. United States*, *Id.*, 212; *Hall vs. United States*, 9 Ct. Cls., 270; *Holman vs. United States*, 11 Ct. Cls., 642; *United States vs. Prescott et al.*, 3 How., 578; *Halbert et al. vs. State*, 22 Ind., 125; *Morbeck and others vs. State*, 28 Ind., 86; *United States vs. Keebler*, 9 Wall., 83.) It is a reasonable proposition that a disbursing officer who, in good faith, lawfully deposits public money with a designated depositary is not chargeable therewith in case of the default of the latter. (*Morgan vs. Van Dyck*, 7 Blatchf. C. C., 152; *Howell vs. United States*, 7 Ct. Cls., 512. See *United States vs. Thomas*, 15 Wall., 337.)

There is much reason for holding that the proper Comptroller has in such cases, and where the account of the disbursing officer remains subject to his jurisdiction, power to grant relief by allowing credit to the officer in the settlement of his account. A claim similar to that now presented would certainly be a proper item for settlement in an account between private parties; hence it would seem to be one which might properly be allowed by accounting officers in the settlement of

a disbursing officer's account. The law provides that "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury." (Rev. Stats., 236.) The authority of the Auditors and Comptrollers, including the Commissioner of Customs, extends to all public accounts, and hence to all items which may be charged or credited thereon. (Rev. Stats., 191, 269, 273, 277, 317.) It is clear that section 236 of the Revised Statutes gives authority to accounting officers to examine and adjust an account against a public depositary for moneys deposited with him by a disbursing officer. It follows, therefore, that when they debit the depositary with such money, the disbursing officer who made the deposit should, in proper cases, be allowed a credit on account of moneys so deposited which are lost by reason of the failure of the depositary.

While the credit which the claimant now asks to be made in his favor must be allowed by the Fifth Auditor before the First Comptroller can formally and finally act on it, (15 Op. Att.-Gen., 139,) it is, nevertheless, proper to take the opinion of the First Comptroller in respect to the matter.

The action of the First Comptroller on November 21, 1866, in certifying a balance against Mr. Hobbs, which included the item for which credit is now asked, is final and conclusive, so far as the accounting officers are concerned. Section 191 of the Revised Statutes provides that—

"The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts * * *."

Section 271 of the Revised Statutes, which is taken from the act of March 3, 1809, (2 Stats., 536,) shows that the decisions of the Comptroller are, in contemplation of law, final. (Kansas case, *ante*, 301, 312; Bender's case, 1 Lawrence, Compt. Dec., 317, 329, 330.) It was said by Mr. Wirt, Attorney-General, as early as 1825, that it was a recognized rule of action "prescribed to itself by each administration, to consider the acts of its predecessors conclusive, as far as the Executive is concerned." Any other rule, he says, would leave "all past acts of all past Executives as open for reconsideration and readjudication." (2 Op., 9.) In this opinion succeeding Attorneys-General concurred. (Taney, 2 Op., 464; Nelson, 4 Op., 341; Toucey, 5 Op., 29; Johnson, 5

Op., 123; Black, 9 Op., 101, 301, 302, 387; Bates, 10 Op., 231, 255; Stanbery, 12 Op., 358, 386; Hoar, 13 Op., 33, 226; Akerman, 13 Op., 297, 387, 456; Devens, 15 Op., 315; 16 Op., 489;—but see Bates, 10 Op., 62.) This view of the case is founded also on judicial sanction. (*United States vs. Bank of the Metropolis*, 15 Pet., 400; *Ex parte Randolph*, 2 Brock. C. C., 447.)

Some matters determined by the First Comptroller may perhaps be reopened by order of the Secretary of the Treasury; *e. g.*, when a claim *against* the United States is rejected, and no balance has been certified, section 191 of the Revised Statutes may not apply to such matter. (Ashton's case, 1 Lawrence, Compt. Dec., 171; Police case, *Id.*, 70; Kansas case, *ante*, 312, 313; Reward case, *ante*, 546.) Whether this case can be reopened by order of the Secretary is not a material question, since there is no such order. When the account of a disbursing officer is under consideration for settlement, the balances previously certified against him by a former Comptroller are not subject to reconsideration.

The fact that before the passage of the act of June 30, 1870, the Second Comptroller gave credit to certain disbursing officers in the military service for losses by deposits similar to that of the claimant, merely shows that that officer considered such credits proper subjects of accounting. It does not give evidence of any right on the part of an accounting officer to review the action of his predecessor.

If there were any doubt as to the existence of jurisdiction in the accounting officers of the Treasury to allow claims similar to those allowed by the Second Comptroller, the act of June 23, 1870, (16 Stats. 166,) might be cited as strengthening the doubt. It authorized the proper accounting officers, "in the settlement of the accounts of disbursing officers of the War and Navy Departments arising since the commencement of the rebellion, and prior to the twentieth day of August, eighteen hundred and sixty-six, to allow such credits for * * * losses of funds, vouchers, and property, as they may deem just and reasonable, when recommended under authority of the Secretaries of War and Navy * * *." This act was limited to be in force for two years, and it prescribed a maximum amount to be allowed. Relief was given under this act to several officers in the military and naval service. Its provisions are remedial; they repealed no prior authority to give relief to disbursing officers. They gave to certain disbursing officers cumulative grounds of relief. (Sedgwick, Stat. and Const. L., 2d ed., 31, 75, 342.) Similarly, the jurisdiction given to the Court of Claims does not take from accounting officers any authority vested in them by statute.

Whether the action of First Comptroller Tayler in certifying the balance against Mr. Hobbs was or was not authorized under the circumstances of the case, that balance cannot now be modified by the accounting officers. It would seem that the claim is a meritorious one, but the relief asked for must be obtained either from Congress or in the Court of Claims.*

TREASURY DEPARTMENT,

First Comptroller's Office, December 29, 1881.

IN THE MATTER OF THE AUTHORITY OF THE SECRETARY
OF THE TREASURY TO ALLOW COLLECTORS OF INTERNAL
REVENUE COMPENSATION IN ADDITION TO THAT FIXED
BY REGULATION.—UTAH CASE.

1. The payment of an additional allowance to a collector of internal revenue after his salary has been lawfully fixed, and after his services have been rendered, is "additional pay" within the meaning of section 1765 of the Revised Statutes.
2. The "scale of compensation" for collectors which was prescribed prospectively by the Secretary of the Treasury under the act of March 1, 1879, is a "regulation," whether it be applied to one officer or to many, and its effect as such is not changed by calling it an "instruction."
3. The authority given to the Secretary of the Treasury by section 251 of the Revised Statutes, to issue "instructions and regulations," embraces two distinct powers, each having a separate purpose. A "regulation" prescribing prospectively the amount of salary to be received by an officer or class of officers cannot be modified in legal effect by calling it an "instruction." Two different and opposite effects cannot be given to one and the same exercise of authority or power.
4. The act of March 1, 1879, gives authority to the Secretary of the Treasury, upon the recommendation of the Commissioner of Internal Revenue, after a salary has been prospectively prescribed and after services have been rendered, to make in certain cases further allowances of salary to collectors within one year after "the close of the fiscal year in which the services were rendered," and such allowances are conclusive on the accounting officers.
5. When a later statute in clear terms gives authority to do an act contrary to the general provisions of a former statute, the later statute creates an exception to such provisions.

The act of March 1, 1879, (20 Stats., 329,) amending section 12 of the act of February 8, 1875, (18 Stats., 307, 309,) authorizes "the Secretary of the Treasury, upon the recommendation of the Commis-

* Since the writing of the above opinion Mr. Hobbs filed a petition in the Court of Claims, and obtained the desired relief.

sioner of Internal Revenue," to make an allowance "for salary and office expenses of collectors" of internal revenue, and provides—

"That the salaries of collectors shall be fixed at two thousand dollars each per annum where the annual collections amount to twenty-five thousand dollars or less, and shall, by the Secretary, on the recommendation of the Commissioner, be graduated up to the maximum limit of four thousand five hundred dollars; which latter sum shall be allowed in all cases where the collections amount to one million of dollars or upward."

The same act declares—

"That there shall be further paid, after the account thereof has been rendered to and approved by the proper officers of the Treasury, to each collector, his necessary and reasonable charges for advertising, stationery, and blank books used in the performance of his official duties, and for postage actually paid on letters and documents received or sent and exclusively relating to official business, but no such account shall be approved or allowed unless it states the date and the particular items of every such expenditure, and shall be verified by the oath of the collector: *Provided*, That the Secretary of the Treasury, on the recommendation of the Commissioner of Internal Revenue, be authorized to make such further allowances, from time to time, as may be reasonable, in cases in which, from the territorial extent of the district, or from the amount of internal duties collected, it may seem just to make such allowances; but no such allowance shall be made if more than one year has elapsed since the close of the fiscal year in which the services were rendered. But the total net compensation of a collector shall not, in any case, exceed four thousand five hundred dollars a year * * *."

June 23, 1880, the Secretary approved an allowance of \$2,375, recommended by the Commissioner of Internal Revenue, as salary of the collector of internal revenue for the district of Utah for the fiscal year ending June 30, 1881, on an estimated collection of \$70,000 during that fiscal year, subject to reduction on the basis of a prescribed "scale of compensation" if the collections did not reach that sum. The collections for that year amounted to \$43,116.79 only, on which, according to the "scale of compensation" prescribed to govern the final allowance,* the salary would only be \$2,250.

November 25, 1881, the Commissioner of Internal Revenue, by letter to the Secretary of the Treasury, said that, although the collections had fallen below the amount estimated, he nevertheless believed that, in consideration of the extent of territory embraced in said district, the collector was justly entitled to the full salary granted in the allowance; and he recommended that the accounting officers be directed to allow credit to him for the full sum of \$2,375 in the adjustment of his accounts.

* For the provisions of the scale, see Wilson's case, *ante*, 211.

November 28, 1881, this letter was referred by the Secretary to the First Comptroller "for an expression of his opinion as to the legality of the allowance as recommended."

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

The Secretary of the Treasury is authorized, upon the recommendation of the Commissioner of Internal Revenue, to make an allowance fixing prospectively for each year the annual salary to which collectors of internal revenue shall be respectively entitled. (Act March 1, 1879, 20 Stats., 329, 330.)

Under the allowance, based, as prescribed in the statute, on a scale of collections, the collector of the district of Utah is entitled to a salary of \$2,250 only for the year ending June 30, 1881.

The inquiry now submitted is, in effect, a question as to whether payment of an additional allowance after services have been rendered is such "additional pay" as is prohibited by section 1765 of the Revised Statutes.

It has been sufficiently shown in former cases that such an allowance is "additional pay, extra allowance, or compensation" within the meaning of that section. (Wilson's case, *ante*, 206, 208; Herndon's case, 1 Lawrence, Compt. Dec., 45; Patton's case, 7 Ct. Cls., 362; 9 Op. Att.-Gen., 123; see Landram's case, 16 Ct. Cls., 84.) That section prohibits "additional pay, extra allowance, or compensation" to any officer in the public service "whose salary, pay, or emoluments are fixed by law or regulations." A collector is an officer in the public service. The statute directs that the salary be fixed at two thousand dollars per annum where the annual collections amount to twenty-five thousand dollars or less, and also that it be graduated up to the maximum limit of four thousand five hundred dollars where the collections amount to one million dollars. (Act March 1, 1879, 20 Stats., 329.)

The statute fixes, upon a graduated scale of collections, a minimum and maximum of annual salary. (Yates's case, *ante*, 213.) The "scale of compensation" prescribed by the Secretary, upon the recommendation of the Commissioner, is a "regulation" within the meaning of section 1765 of the Revised Statutes. (Herndon's case, 1 Lawrence, Compt. Dec., 55; Wilson's case, *ante*, 208; Yates's case, *ante*, 214.)

The power to prescribe "regulations" for collectors and deputy collectors of internal revenue, and the effect of *retroactive* allowances of compensation to such deputies, have been already considered. In Herndon's case (1 Lawrence, Compt. Dec., 45) it was held that the

usual mode of prescribing the compensation of deputy collectors is by a *regulation*; and it was also held that a retroactive increase of such compensation is within the prohibition of section 1765 of the Revised Statutes. (*Id.*, 45; Wilson's case, *ante*, 208; Yates's case, *ante*, 214.) The construction thus given is still adhered to in the settlement of accounts of collectors of internal revenue. It seems to have been supposed that as the prohibition of section 1765 applies only to officers and persons in the public service whose salary, pay, or emoluments are "fixed by law or regulations," that if compensation be fixed by an *instruction* of the Secretary of the Treasury it does not fall within the prohibition. (Landram's case, 16 Ct. Cls., 74.)

The question is somewhat important as affecting the duty of accounting officers hereafter, and it is relevant to the subject now under consideration.

The statute, in giving the Secretary of the Treasury authority to make an allowance, does not prescribe the mode in which it is to be done. The Secretary is authorized to make "regulations" not inconsistent with law, and to issue "instructions" to the several collectors. (Rev. Stats., 161, 251.) A "regulation" may have the effect of a law which confers a right upon those on whom it operates; as, for example, when it prescribes the amount of salary which an officer or employé may receive. A direction or order which fixes the amount of salary is not merely an "*instruction*;" it is a regulation, a rule which has the force of law. (Act March 1, 1879, 20 Stats., 329.) There is an inherent difference in purpose and effect between an *instruction* and a *regulation*. That which is in effect a regulation is such even when by misnomer it is called an instruction. Whatever is prescribed is to be judged, not by what it is called, but by what it is. This view is supported in principle by the analogy of many cases. (3 Pars. Cont., 6th ed., 157; *Sainter vs. Ferguson*, 7 C. B., 716; *Davies vs. Penton*, 6 B. & C., 234; *The Great Fails case*, 16 Ct. Cls., 160.)

"The quality of a thing is not altered by changing its name." (*State vs. Hipp*, Sup. Ct. Ohio, June, 1882.)

An officer authorized to prescribe the amount of a salary cannot exercise that authority by an "instruction" so as to give an effect different from the effect of an exercise of that authority through a regulation on the same subject. He cannot confer a right under an instruction in respect of salary which cannot be conferred by a regulation on the same subject. (Rev. Stats., 1765.) When Congress gives authority to officers to prescribe salaries, it can scarcely be supposed that the effect of the exercise of this authority is to depend on the mode of its exercise or on the name which the officer affixes to his act. If the authority depended on

the mode or the name, the officer would, in such case, be invested with a dangerous discretion, not inaptly styled "the law of tyrants." Certainly, no presumption is to be indulged which would admit of such fluctuating power. Any difference of effect from the mode in which a public power is exercised must be supported by clear language in the grant of the power. When an order is made fixing a salary to be paid, it operates (1) on the Government in imposing a duty to pay, and (2) on the person in whose favor it is made in giving him a right to the salary. When Congress fixes a salary, it is not done by an instruction, but by a law. When Congress authorizes an officer to fix compensation, the same effect is produced as if Congress had fixed the compensation. The act of fixing has, therefore, the effect of a law; and, therefore, it is a "rule," a "regulation," not a mere instruction. A "regulation" may apply to one object, person, or officer, as well as to a class. A local statute may apply only in a given place; therefore, why not a regulation? A private statute may give a right to, or impose a duty upon, a single person or officer; why not a regulation? The purpose of Congress in giving authority to issue regulations was to provide necessary rules of duty and of action. Such authority comprehends the power to do that which an act of Congress might do, namely, to make rules having the force of law. The words "regulations" and "instructions" as used in section 251 of the Revised Statutes must be interpreted as having separate and distinct purposes, in order "to give to one some operation not embraced in the other, so that each may, if possible, have some effect." (Sedgwick, Stat. and Const. L., 2d ed., 211; N. L. & B. Inst. *vs.* Com., 14 B. Monroe, 266.) There could be no certainty if the two powers, given for distinct purposes, can be blended, confused, and mixed. Congress did not legislate to organize confusion. The allowance in this case was made pursuant to a regulation authorized by law which fixed the salary according to a statutory rule, and section 1765 of the Revised Statutes prohibits any additional allowance in respect of a salary so fixed, unless some law now in force takes the case out of the prohibition of that section. Does the act of March 1, 1879, above cited, take this case out of the prohibition of section 1765 of the Revised Statutes? It gives authority "to make such *further* allowances, from time to time, as may be reasonable, in cases in which, from the territorial extent of the district, or from the amount of internal duties collected, it may seem just to make such allowances;" but it provides that no such allowance shall be made if more than one year has elapsed since the close of the fiscal year in which the services were rendered. This act, in express terms, authorizes, in the cases

provided for, allowances *after* the services have been rendered, and hence, as to such allowances, section 1765 of the Revised Statutes does not apply. A part of the collector's salary may depend on the amount collected by him within the fiscal year, and this can be ascertained only after the expiration of the fiscal year.

This purpose of Congress to give authority to make additional allowances to collectors after services rendered and salaries definitely fixed is further shown by the fact that, as to deputy collectors, while the statute seems to give power to make allowances in respect of their salaries, it does not, as in the case of collectors, authorize "further allowances" to them after they have rendered service at a fixed rate of compensation. The compensation of deputies is generally fixed prospectively. (Wilson's case, *ante*, 206; Patton's case, 7 Ct. Cls., 362; 9 Op. Att.-Gen., 123.) Whether the statute requires the compensation of deputies to be prescribed in advance is not now material. But it would seem that it contemplates that the compensation should be fixed within the fiscal year of the service. The salaries of officers are generally payable in monthly instalments. It is not probable that Congress intended that deputy collectors should wait for payment until the end of a year's service. Their compensation, although not fixed in amount by statute, is so fixed by a proceeding in the nature of a contract. (Patton's case, 7 Ct. Cls., 362.) The deputy, by rendering service under an allowance previously fixed, assents thereto, and this is a contract. If he enter the service relying upon the Secretary to prescribe the salary during the fiscal year, this is still in the nature of a contract to accept such rates as may be fixed. The law provides that appropriations made for the service of a fiscal year "shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year." (Rev. Stats., 3690.) And there are other provisions which contemplate that the extent of the public expenditures in each fiscal year is to be determined by the service rendered or the liability incurred during the year. (Rev. Stats., 3662, 3679, 3691.) Section 250 of the Revised Statutes requires the Secretary of the Treasury to cause all accounts of the expenditure of public money to be settled within each fiscal year, except where the distance of the places where such expenditure occurs may be such as to make further time necessary. This section contemplates that compensation for services rendered in a fiscal year should be fixed during the year, except as to cases otherwise expressly provided for; and exceptions should not be carried beyond the clear words of the statute creating them.

In view of the principles referred to, and to make an exception to them and to section 1765 of the Revised Statutes, the act of March 1, 1879, was passed, in order, among other purposes, to confer authority on the Secretary of the Treasury to make in certain cases "further allowances" to collectors after the salaries had been fixed pursuant to general law. As the authority is clearly exceptional, the inquiry may arise as to whether, upon settled principles of construction, it applies to collectors only, or whether it may be construed as authorizing "further allowances" to be made to deputies after the fiscal year of service. By a reference to the provisions of prior statutes which authorized additional allowances to collectors, it would seem that these provisions did not extend to the case of deputies serving at fixed salaries, and that the statute now in force is a re-enactment of the former statutes, with merely a change as to the mode of compensating deputies. (Act June 30, 1864, 13 Stats., 232; Act March 3, 1865, 13 Stats., 469; Patton's case, 7 Ct. Cls., 362.) It is not necessary to ascertain, in view of the principles stated, whether as to deputies an allowance could be made after the fiscal year, (Rev. Stats., 250, 3662, 3679, 3691;) or whether the power to make an original allowance having been exercised during a fiscal year, and for the service of that year, thereby became exhausted—*functus officio*. (Patton's case, 7 Ct. Cls., 362.) As to the questions: whether the statute giving authority to make "further allowances" to collectors is not a recognition of the principle that a power once exercised cannot be again exercised to increase an allowance already made; whether, if it may be so increased, it may be reduced, (7 Ct. Cls., 362;) whether, if limited services are rendered as a gratuity, creating no legal right, an allowance can be made for compensation as a gratuity, and especially after the fiscal year; and, if "further allowances" can be made for deputies as well as collectors, whether they can be made after the limitation prescribed by the statute, in respect of collectors, has commenced to run, or whether they can be made only within one year after the close of the fiscal year in which service was rendered, their solution may be properly left for such occasion as may require it.

The phraseology of the act of March 1, 1879, gives some color to the idea that the "further allowances" which the Secretary is authorized to make to each collector "for advertising, stationery," &c., applies, upon the maxim *Noscitur à sociis*, only to expenses of office; but this view is not tenable. The language and context of the statute show that the words "further allowances" relate to compensation. There is nowhere a limit in respect of reasonable expenses, and hence no need

to authorize a further allowance in respect of such expenses. The authority conferred by the act of March 1, 1879, to make, as to services already rendered, further allowances of salary to collectors is not defeated by the prohibition in section 1765 of the Revised Statutes, which declares that "no additional pay" shall be allowed, "unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay." There is no appropriation for "additional pay" to collectors which "explicitly states that it is for such additional pay." But this restriction of section 1765 does not apply to the authority conferred by the act of March 1, 1879, to make "further allowances." The act of 1879 is subsequent to the Revised Statutes, and by fair implication it excepts from the operation of section 1765 of the revision the action of the Secretary making additional allowances of salary to collectors.

Within the limits prescribed, the statute gives to the Secretary of the Treasury, on the recommendation of the Commissioner of Internal Revenue, a discretionary authority in making allowances for salary of collectors over which accounting officers have no control. (Seward's case, *ante*, 63.)

The Secretary of the Treasury is therefore authorized to make the allowance recommended by the Commissioner of Internal Revenue.

TREASURY DEPARTMENT,

First Comptroller's Office, December 30, 1881.

IN THE MATTER OF THE RIGHT OF EMPLOYÉES IN THE BUREAU OF ENGRAVING AND PRINTING TO COMPENSA- TION DURING LEAVE OF ABSENCE.—LEAVE-OF-ABSENCE CASE.

1. The right of an officer to a salary fixed by statute for his office does not depend upon the extent or value of his services.
2. If the salary of an officer is fixed by regulation or contract, performance of the conditions thereof may be requisite to give the right to payment.
3. Employés of the Government whose compensation is fixed pursuant to regulations or contract occupy the same position as officers whose salary is fixed in the same way.
4. The *usage* by which officers and employés generally in the Treasury Department receive leave of absence for one month, with pay, in each year of continuous service, or in that proportion for a less time of service, has been so long and uniformly acted upon and recognized that it is *lawful*.
5. The usage may, as to officers, and also, generally, as to employés, be discontinued at any time.

6. The right of *officers* and of *general employés* in continuous service in the Bureau of Engraving and Printing, under section 3577 of the Revised Statutes, to leave of absence with pay depends on such *regulations* as may be prescribed by the Secretary of the Treasury, and upon the usages he may sanction, or the contracts he may make.
7. Under the act of March 3, 1881, (21 Stat., 438,) the skilled labor therein mentioned may, at the discretion of the Secretary of the Treasury, be performed in one or more of three modes, to wit: (1) by the day, (2) by the piece, or (3) by contract; and when performed in either mode, the pay for labor is to be fixed by the Secretary of the Treasury, at rates not exceeding those usually paid.
8. The right of employés in the Bureau of Engraving and Printing, in continuous service *by the day*, to leave of absence with pay for a limited portion of each week, month, or year, depends on the question of fact whether such leave of absence, with such right to pay, is one of the terms or conditions of contracts under which such employés are usually employed, as the same may be determined by the Secretary of the Treasury, whose decision is conclusive.
9. As to employés performing labor for pay "by the piece," the statute authorizes compensation for the piece *work* actually performed, not for *time* when no labor is performed.
10. The contract price of labor performed under contract is the measure of the right to compensation acquired by the laborer.
11. The Secretary is authorized to consider the general usage, if any there be, as to leave of absence in fixing such compensation; and his decision is conclusive.

December 15, 1879, James Gowans and other employés of the Bureau of Engraving and Printing made application to the Chief of the Bureau for leave of absence, on the same conditions regarding pay as those which usually apply to leave of absence granted to other employés of the Treasury Department. On the same day this application was forwarded to the Secretary of the Treasury by the Chief of the Bureau, with a request that the question as to whether employés of that bureau who are engaged and paid by the day or piece can be granted leave of absence, with pay, upon their own request, be submitted to the First Comptroller, for his opinion thereon.

The Chief of the Bureau, in a letter to the First Comptroller, dated October 21, 1881, stated that he had never heard whether the matter was considered, and asked the Comptroller, if consistent with his views of duty, to pass upon it.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

The Revised Statutes contain these provisions:

SEC. 3577. The Secretary of the Treasury may cause notes to be engraved, printed, and executed, at the Department of the Treasury in Washington, and under his direction, if he deems it inexpedient to procure them to be engraved and printed by contract; and he may

purchase and provide all the machinery and materials, and employ such persons and appoint such officers as are necessary for this purpose. (See act March 3, 1875, 18 Stats., 371.)

SEC. 3738. Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States.

SEC. 1545. Salaries shall not be paid to any employés in any of the navy-yards, except those who are designated in the estimates. All other persons shall receive a per diem compensation for the time during which they may be actually employed [in the navy-yards.] (See another limitation on employment and compensation in Revised Statutes, 171.)

The act of March 3, 1881, (21 Stats., 394,) makes an appropriation as follows:

"BUREAU OF ENGRAVING AND PRINTING.—For chief of bureau, four thousand five hundred dollars; one assistant. at two thousand two hundred and fifty dollars; accountant, two thousand dollars; one stenographer, one thousand six hundred dollars; one clerk of class three; one clerk of class two; four clerks of class one; one clerk at one thousand dollars; additional to one clerk, as disbursing clerk, two hundred dollars; three copyists, at nine hundred dollars each; two assistant messengers; and four laborers; in all, twenty-six thousand one hundred and thirty dollars."

An act of the same date (21 Stats., 438) makes an appropriation—

"For labor and expenses of engraving and printing, namely: For labor (by the day, piece, or contract), including labor of workmen skilled in engraving, transferring, plate-printing, and other specialties necessary for carrying on the work of engraving and printing notes, bonds, and other securities of the United States, the pay for such labor to be fixed by the Secretary of the Treasury at rates not exceeding the rates usually paid for such work; and for other expenses of engraving and printing notes, bonds, and other securities of the United States; for materials, required in the work of engraving and printing; for purchase of engravers' tools, dies, rolls, and plates, and for machinery and repairs of same; and for expenses of operating macerating machines for the destruction of the United States notes, bonds, national-bank notes, and other obligations of the United States authorized to be destroyed, three hundred and twenty-five thousand dollars."

The service in the Department of the Treasury is performed (1) by *officers*, (2) by *employés*, and (3) by contractors.

1. *Officers* in the public service are generally paid salaries which are prescribed by *statute*, or, in some cases, by regulations prescribed by the heads of Departments, respectively, though in some branches of the service they are paid by fees or commissions. (Rev. Stats., 169, 235, 824, 828, 829, 3145, 4185, 4186; Acts March 3, 1875, sec. 2, 18 Stats., 396; March 1, 1879, 20 Stats., 329.)

2. *Employés* in the public service, where employment is continuous, are generally paid at the rate of compensation expressly prescribed by

statute or fixed by *regulations* prescribed by the heads of Departments. (Evans's case, *ante*, 8.)

3. Persons continuously employed in the public service under contract, whose compensation is not fixed by statute or regulation, are paid in the manner and amount stipulated in their contracts. For example: (1) at a monthly or other periodical compensation, (2) *by the day*, (3) a fixed sum for work "by the piece," and (4) a fixed sum for work on its completion as an entirety. Some of the officers and employés in the Department of the Treasury render service under the organic laws of the Department, while others render service under the express or implied authority of annual appropriation acts.

The general laws relating to the Treasury Department provide for officers therein with fixed annual salaries, and also for certain employés, with prescribed annual salaries, who are not officers. (Rev. Stats., 233-235; 18 Stats., 396.)

It is well settled that public officers are, in the absence of statutory provisions or authorized regulations to the contrary, generally entitled to the payment of the salaries prescribed for their offices, without reference to the extent or value of the services rendered by them. (Evans's case, *ante*, 8; Seward's case, *ante*, 60; Sleigh's case, 9 Ct. Cls., 369; see Rev. Stats., 40, 41, 171, 1265, 1742.) If the salary of an officer be prescribed by regulation, the right to payment thereof may depend upon a compliance with the conditions, if there be any, laid down in the regulation. Such an officer stands very much in the condition of one compensated by fees who cannot lawfully claim them unless he perform the services for which the fees are prescribed. It follows from this that employés serving under contract, whether express or implied, may, as a condition precedent, be required to perform reasonable or stipulated service before a right to compensation can accrue.

The Secretary of the Treasury is authorized "to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business * * *." (Rev. Stats., 161.) Under this power, and pursuant to the general authority inherent in and incident to his office, a *usage* has been established of giving a leave of absence to officers and persons continuously employed in the Department in Washington for one month each year, with a right to receive salary or compensation during the time of absence. Congress, in making appropriations for full annual service, has so long recognized this usage that its legality is beyond question. (*United States vs. Maurice et al.*, 2 Brock. C. C., 105.) It is sufficient evidence of the law that "it hath

always been so." *Consuetudo loci est observanda.* (Broom., Leg. Max. 918.) Officers, including clerks, and also employes, including messengers and laborers, with annual compensation prescribed by statute or regulations, all share equally in the privilege.*

The Secretary, undoubtedly, has a right to make exceptions to the *usage* at any time, either generally or in respect of one or more officers or employes, without giving a right of action as for breach of contract, since employment is accepted subject to the right of the Secretary to make or alter the regulations prescribed for the conduct of the Department or any of its bureaus. The usage while it continues is, in effect, a regulation which has the force of law; but, being prescribed by the Secretary, he can at any time abrogate, suspend, or make exceptions to it. No right would be thereby violated, and hence no right of action could arise therefrom. A *contract* for continuous service might, under the usage, expressly or by implication, give rights which could not be revoked. With these general statements, the question presented for consideration is reached.

By virtue of the act of July 11, 1862, carried into the Revised Statutes, under the caption of "The Currency," as section 3577, the Secretary of the Treasury has authority to "employ such persons and appoint such officers as are necessary" to cause to be engraved, printed, and executed United States notes, commonly called greenbacks, &c. The acts making annual appropriations to carry out this provision recognize this branch of the service as a *bureau* of the Treasury Department in which a body of officers and employes render service, under the authority and direction of the Secretary of the Treasury. If the original section, 3577, stood alone, with appropriations in gross sums to carry out its objects, the Secretary of the Treasury would have authority, as the chief official representative and general agent of the Government for the purposes of the section, to make any reasonable contract for continuous services, at such rate of compensation and with such stipulations as to leave of absence, with or without pay, as he might deem just. His discretion and sense of duty to the public and to the employes would be almost his sole guide. He could contract for labor by the day, piece, or specific portion of work, but would not be bound to do so. He could appoint such officers, with such salary and with such right to leave of absence, with or without payment of salary, as he might deem proper. His power would be limited only by the provision that no contract should be made which would involve the Government

* The "Rules and regulations of the Bureau of Engraving and Printing, Treasury Department, covering its organization, accountability for values, and methods of business," as approved by the Secretary of the Treasury, contain nothing in respect of leave of absence for employes therein.

in a liability "for the future payment of money in excess of * * * appropriations for that fiscal year." (Rev. Stats., 3679.) He could also make "regulations" governing the rights of all employés as to leave of absence and as to compensation in such cases. In short, he could establish rules which would grow into *usages* on the subject, and could make *contracts* for continuous service in view thereof, by which the *usages* would become, in legal effect, a part of the contracts. (1 Greenl. Ev., secs. 292-294.)

These principles are applicable to officers and employés in the Bureau of Engraving and Printing, so far as they have not been affected by legislation. They have not been changed as to salaried officers, including clerks, nor as to messengers and laborers in continuous service, under the act of March 3, 1881. (21 Stats., 394.) These are entitled to leave of absence, with or without right to compensation, as the Secretary may prescribe by regulation, allow by usage, or provide for or against by specific contract. There is no right to leave of absence with pay unless it is given by regulation, usage, or contract. The Secretary's discretion and his sense of duty and justice to the Government and to the employés, so far as there is no restraint by contract, express or implied, with the employés, will control in the determination of rights and duties.

But the act of March 3, 1881, (21 Stats., 438,) making an appropriation for "labor and expenses of engraving and printing," makes specific provision as to all labor of engraving and printing, including "labor of workmen skilled in engraving, transferring, plate-printing, and other specialties necessary for carrying on the work of engraving and printing notes, bonds, and other securities of the United States." As to all these forms of labor the statute makes two provisions:

1. It shall be performed "by the [1] day, [2] piece, or [3] contract."
2. "The pay for such labor to be fixed by the Secretary of the Treasury at rates not exceeding the rates usually paid for such work."

As to all employés under this statute, the regulations prescribed by the Secretary of the Treasury provide that: "Employés can only be paid for the time actually employed in the service of the Bureau." This regulation determines the rights of such employés. The regulations also fix the rate of *per-diem* compensation to different classes of employés. As to those employed *by the day*, the statute requires the Secretary to fix the pay at rates not exceeding the rates usually paid for such work by private employers. It contemplates the placing of service to the Government, when performed for *daily wages*, on substantially the same terms as those upon which other *per-diem* employés are "*usually paid*" for like service. If "the rates usually paid" are eight dollars per

day, or any greater or less sum, for a specific kind of skilled labor, for six full days in each week, the Secretary of the Treasury is authorized by the statute to prescribe rates of wages on this basis. Indeed, the statute contemplates that he shall. If "the rates usually paid" are eight dollars per day for six days each week, with only five and a half days' actual work, the law contemplates the same kind of compensation for the same kind of service, or its equivalent. If the rate usually paid is a fixed sum per day for a year or less period, with leave of absence with pay for a month in the year, or other prescribed time, the statute contemplates a similar compensation, and with equal privilege. The authority of the Secretary of the Treasury to fix "the pay for such labor" makes the compensation he fixes and the time and mode of computing it conclusive on all concerned. The accounting officers have no control over it. (Seward's case, *ante*, 63; Fletcher *vs.* Peck, 6 Cranch, 133.) It is to be presumed that the regulations referred to, fixing *per-diem* compensation, *for the time actually employed*, were made on the basis of the rates usually paid, and, under these regulations, there can be no right on the part of *per-diem* employés to leave of absence with pay.

As to those who are employed "*by the piece*," the statute gives the Secretary equally conclusive authority to fix the price with reference to "the rates usually paid." If their employment is affected by a general usage outside of the Department in respect of leave of absence, the Secretary has authority to consider that usage as an element in the contract of employment. But the statute, taken by itself, contemplates pay for labor by the piece for work actually performed, and not for time when labor is not performed. (Clark *vs.* Marsiglia, 1 Denio, 317; 2 Greenl. Ev., sec. 261 *note* (a).) In such case it is *performance*, not *time*, which gives the right to compensation. As one man may perform a given piece of work in less time than another, it would be somewhat difficult to make compensation for piece-work on a time basis.* The statute does not contemplate leave of absence with pay in the case of piece-work employés. The work "by contract" referred to in the statute is that in which some specific piece or pieces of engraving, or particular amount of printing, &c., is to be done at an agreed price. The contract rate is that which is to be paid, and no question can arise as to leave of absence.

The principles stated govern as to leave of absence.

TREASURY DEPARTMENT,

First Comptroller's Office, December 31, 1881.

* The "rules and regulations of the Bureau of Engraving and Printing" authorize persons employed by the day to work "over-time," but not exceeding in all twelve hours in any one day; the full work-day being eight hours.

IN THE MATTER OF COMPENSATION OF GAUGERS OF SPIRITS ON ANY BASIS OTHER THAN THE QUANTITY GAUGED PER DIEM.—KILBOURN'S CASE.

1. Section 3157 of the Revised Statutes gives authority to the Commissioner of Internal Revenue to prescribe fees to which gaugers should be entitled, but such fees are "to be determined by the quantity [of spirits] gauged." This section contemplates a fee to be prescribed by the Commissioner for each gallon, or barrel, or other quantity of spirits gauged.
2. The fee authorized cannot be prescribed for the *time* employed in the service of gauging; it can be determined only by the *quantity* of spirits gauged. The act of August 15, 1876, provides that gaugers shall receive compensation only when rendering actual service; in other words, that they shall be paid only for work done in gauging spirits.
3. The Commissioner of Internal Revenue has no authority to prescribe compensation for gaugers in any manner other than by fees; and the fees prescribed as such compensation must be ascertained on the basis of the quantity of spirits gauged.
4. The statutes give neither express nor implied authority to allow to gaugers an average compensation, even for several days' actual and continuous service. The element of time cannot be considered, except in so far as it affixes a limitation on the amount of fees which may be earned in any one day; they "shall not exceed five dollars per day while actually employed."
5. The authority to prescribe an average rate of compensation is not implied as incident to or as necessary and proper for carrying into full effect the authority expressly given to prescribe fees which shall be "determined by the quantity [of spirits] gauged." The authority given by the statute is not to be enlarged by construction beyond the fair meaning of the words employed.
6. A statute which authorizes an executive officer to fix a rate of salary or *per-diem* compensation does not, *ipso facto*, authorize him to prescribe compensation by fees or commissions; and one which gives authority to prescribe compensation by fees or commissions for official acts does not, *ipso facto*, authorize an allowance of a salary or a *per-diem* compensation which would exceed in amount the fees or commissions prescribed for such acts.
7. The provision requiring payment to be made monthly simply gives to gaugers the same right of payment which is generally enjoyed by other officers and employés in the service of the Government. It has no relation to the amount to be paid, and is not to be considered as an element in fixing the amount of fees to which gaugers may be entitled.
8. The purpose of the statute, clearly, is to pay a *per-diem* compensation to gaugers in proportion to the quantity of work done each day; hence, the service of each day stands by itself, as in all other cases of service by the day. As the compensation of the gauger depends upon the quantity of spirits actually gauged each day, no fees can be earned on days when no spirits are gauged.
9. Under the statutes and the schedule of fees prescribed by the Commissioner of Internal Revenue, it is clear that each day's service must stand by itself. If,

e. g., the gauger should gauge 2,800 gallons of spirits on one day, the schedule rate of fees would be \$6.50; and if the fees for the gauging done the next day amounted to only \$3.50, it would not be competent for the Commissioner to allow \$5 for the second day's service by carrying to the credit of that day the excess of \$1.50 accrued on the previous day's fees.

10. It may be competent for the Commissioner to prescribe a rate of fees applicable to special cases, as, *e. g.*, for tobacco inspectors, when the ordinary fees are not deemed sufficient to yield reasonable compensation. But when an officer has performed service under a fixed schedule of fees, no retroactive allowance of compensation can be made to him.
11. Heretofore, the compensation and travelling expenses of gaugers have been paid in accordance with the regulations of the Commissioner of Internal Revenue. As the disbursing officers have made such payments on the faith of these regulations, which have been recognized as valid, the construction now given to the statutes will be made to take effect prospectively.

Oscar Kilbourn, internal-revenue gauger at Portland, Oregon, was employed in gauging spirits 17 days in February, 1880, during which time he gauged 7,382.50 proof-gallons, for which the average compensation at the rate per gallon prescribed in the regulations would be \$3.07 per day; in all, \$52.19. In his "monthly bill" for February, 1880, he charges the United States for 24 days, at \$4 per day, \$96, for gauging said spirits, and \$78.50 for travelling expenses; in all, \$174.50. The bill contains a statement that "according to paragraphs 5 and 24 of Circular No. 205, according to the special rate of fees prescribed for the service rendered, his compensation should be computed at \$4 per day for 24 days' services, \$96." The itemized statement of travelling expenses shows that he travelled during the month on several other days when not actually employed in gauging. The following table, made up from Mr. Kilbourn's bill for the month of February, 1880, sets forth the days upon which he was actually employed in gauging distilled spirits, the number of gallons gauged each day, and the fees earned each day on the basis of an allowance for each day separately:

Days employed in gauging.	Gallons gauged each day.	Fees earned each day.	Days employed in gauging.	Gallons gauged each day.	Fees earned each day.
February 2, 1880...	443	\$3 28½	February 21, 1880...	50	\$1 60
" 3, 1880...	170	1 70½	" 23, 1880...	806	4 00
" 4, 1880...	415	3 23	" 24, 1880...	139	2 19½
" 9, 1880...	162	2 31	" 25, 1880...	392	3 1½
" 10, 1880...	271	2 70½	" 26, 1880...	585	3 57
" 16, 1880...	293	2 96	" 27, 1880...	454	3 3½
" 17, 1880...	161	2 31	" 28, 1880...	968	4 21
" 18, 1880...	624	3 65			
" 19, 1880...	881	4 10½		7, 376	51 ¼
" 20, 1880...	562	3 52½			

August 31, 1881, the monthly bill was approved for \$174.50 by the Acting Commissioner of Internal Revenue, and on September 3, 1881, it was also approved by the Assistant Secretary of the Treasury.

September 28, 1881, the Fifth Auditor examined and adjusted an account on this bill, between the United States and Mr. Kilbourn, and found a balance of \$174.50 due him from the United States. The account and papers are referred by the Auditor to the First Comptroller for his action thereon.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

Section 3157 of the Revised Statutes provides that gaugers shall be entitled to receive such fees, to be determined by the quantity gauged, as may be prescribed by the Commissioner of Internal Revenue, and that such fees, together with their actual and necessary travelling expenses, shall be verified by their oaths, and shall be paid by the United States monthly.*

The act of August 15, 1876, (19 Stats., 152,) provides, in respect of compensation of gaugers, as follows:

"* * * and said gaugers and storekeepers, respectively shall only receive compensation when rendering actual service."

The act of June 19, 1878, (20 Stats., 187,) imposes a maximum limit on the allowance of compensation to gaugers, as follows:

"* * * and hereafter the compensation of gaugers shall not exceed five dollars per day while actually employed."

Public services may be compensated (1) by a fixed sum as salary, (2) by fees, (3) by commissions, (4) by *per diem* compensation, or (5) by other allowance. These modes of compensation may be fixed by statute, or be prescribed by officers in pursuance of the express or implied authority of a statute.

Section 3157 of the Revised Statutes gives authority to the Commissioner of Internal Revenue to prescribe fees to which gaugers should be entitled, but such fees are "to be determined by the quantity [of spirits] gauged * * *." This section contemplated a fee to be prescribed by the Commissioner for each gallon, or barrel, or other quantity of spirits gauged. The fee authorized cannot be prescribed for the *time* employed in the service of gauging; it can be determined only by the *quantity* of spirits gauged. If there were any reasonable doubt as to this construction, it would be removed by the provision of the clause of the act of August 15, 1876, above cited, which expressly

* For the regulations in respect of fees and expenses of gaugers, see pages 578-581, *post*.

provides that gaugers shall receive compensation only when rendering actual service; in other words, that they shall be paid only for work done, namely, for gauging spirits.

While the act of June 19, 1878, provides that "the compensation of gaugers shall not exceed five dollars per day while actually employed," it nevertheless left in force the authority vested in the Commissioner by section 3157 of the Revised Statutes to prescribe a rate of fees on the basis of the quantity gauged. It merely added a new element, a limitation on the power, so that thereafter no rate of fees should be prescribed by which the compensation of gaugers might exceed five dollars per day while actually employed in gauging. These provisions of the statutes give to the Commissioner a power which he is to execute, and the extent and character of this power are to be considered.

A statute which authorizes an executive officer to fix a rate of salary or *per-diem* compensation does not, *ipso facto*, authorize him to prescribe compensation by fees or commissions; and one which gives authority to prescribe compensation by fees or commissions for official acts does not, *ipso facto*, authorize an allowance of a salary or a *per-diem* compensation which would exceed in amount the fees or commissions prescribed for such acts. (Story, Agency, secs. 21, 58, 125.) Any reasonable construction of the statutes referred to must make manifest the following conclusions:

- (1.) That the statute which prescribes a maximum compensation of \$5 per day for gaugers contemplates that sometimes a less sum per day may be earned.
- (2.) That the Commissioner has no authority to prescribe compensation other than fees.
- (3.) That the fees prescribed must be ascertained on the basis of the quantity of spirits gauged.

The statutes give neither express nor implied authority to allow to gaugers an average compensation, even for several days' actual and continuous service. The element of time cannot be considered, except in so far as it affixes a limitation in respect of the amount of fees which may be earned in any one day—they "shall not exceed five dollars per day while actually employed." The power to prescribe an average rate of compensation is not implied as incident to or as necessary and proper for carrying into full effect the authority expressly given to prescribe fees which shall be "determined by the quantity [of spirits] gauged." The authority given by the statute is not to be enlarged by construction beyond the fair meaning of the words employed. (Story, Agency, sec. 68; *Atwood vs. Munnings*, 7 B. & Cressw., 283; *Ducarrey vs. Gill*, 1

Mood. & Malk., 450; Withington *vs.* Herring, 5 Bing., 442; Lloyd's Paley on Agency, 3d ed., 192.) If the statute had declared that the compensation of gaugers shall not exceed \$150 per month, or had used other words which might reasonably indicate an intention that the time of employment under an appointment as gauger might be considered in allowing compensation, there might be some ground to claim the authority to prescribe an average *per-diem* compensation or a gross sum per month, without reference to the quantity of work done in any particular day's service. The fact that payment is required to be made "monthly" is a regulation for the benefit of the gauger, but it does not authorize compensation to be computed by the month. Under section 3157 of the Revised Statutes, payments could not be made as for a month's service, or for the service of several days of a month, but only for fees determined by the quantity of spirits gauged each day. The provision requiring payment to be made monthly simply gives to gaugers the same right of payment which is generally enjoyed by other officers and employés in the service of the Government. It has no relation to the amount to be paid, and is not to be considered as an element in fixing the amount of fees.

The statute which directs that gaugers' fees shall not exceed five dollars per day while they are actually employed must be construed as fixing a maximum compensation for each day. The words employed admit of no other construction. The expression "fees" which "shall not exceed five dollars per day" carries the idea of compensation for each day taken by itself by fees arising upon the service of that day only. It implies that the compensation arises *de die in diem*. This construction follows the analogy of that given to other similar statutes. Clerks of circuit courts are entitled to compensation by fees, under a limitation, however, that none of them shall "be allowed * * * to retain of the fees * * * a sum exceeding three thousand five hundred dollars a year." (Rev. Stats., 839.) It has never been claimed that the emoluments of the clerk's office for several years could be averaged, so as to make up to the incumbent a deficiency of the fees of one year from an excess of fees collected for another year.

The purpose of the statute, clearly, is to pay a *per-diem* compensation to gaugers in proportion to the quantity of work done each day. Hence the service of each day stands by itself, as in all other cases of service by the day. As the compensation of the gauger depends upon the quantity of spirits actually gauged each day, it is clear that no fees can be earned on days when no spirits are gauged. Under the statutes and the schedule of fees prescribed by the Commissioner of Inter-

nal Revenue, it is clear that each day's service must stand by itself. If, *e. g.*, the gauger should gauge 2,800 gallons of spirits on one day, the schedule rate of fees would be \$6.50, and if the fees for the gauging done the next day amounted to only \$3.50, it would not be competent for the Commissioner to allow \$5 for the second day's service by carrying to the credit of that day the excess of \$1.50 accrued on the previous day's fees. The statutes neither give nor authorize to be allowed compensation for any service other than that of gauging spirits. This construction is rendered conclusive by the expressions in the statutes "while actually employed," "when rendering actual service."

It may be competent for the Commissioner to prescribe a rate of fees applicable to special cases, as, *e. g.*, for tobacco inspectors when the ordinary fees are not deemed sufficient to yield reasonable compensation. (Yates's case, *ante*, 213.) But when an officer has performed service under a fixed schedule of fees, no retroactive allowance of compensation can be made to him. (Wilson's case, *ante*, 206; Utah case, *ante*, 563.)

For the service performed by Mr. Kilbourn in the month of February, he is entitled, on a proper construction of the statute, to \$51.84 only, and for travelling expenses, \$28.50.

Heretofore, the compensation and travelling expenses of gaugers have been paid in accordance with the regulations of the Commissioner. As the disbursing officers have made such payments on the faith of these regulations, which have been recognized as valid, the construction now given to the statutes referred to will be made to take effect prospectively.

TREASURY DEPARTMENT,

First Comptroller's Office, December 31, 1881.

The following are the regulations referred to in the text, page 575:

SUPPLEMENT TO CIRCULAR NO. 182.

Modification as to the Manner of Computing the Fees therein prescribed.

1878.
Department No. 38 }
Internal Revenue.

TREASURY DEPARTMENT,
Office of Internal Revenue, Washington, D. C., April 25, 1878.

Circular No. 182, entitled "Regulations concerning gaugers' fees and expenses," issued by this office March 21, 1878, is hereby modified by striking out paragraph 4 in said circular, and inserting in lieu thereof the following:

"The compensation of a gauger shall in no case exceed the sum of five dollars per day for every day actually employed. The number of proof-gallons gauged by him during the month will be divided by the number of days employed, and the prescribed *per-diem* fees will be allowed for the daily average amount so found to have been gauged, subject to the limitation of five dollars per day. This modification to apply to all gauging done upon and after April 1, 1878."

GREEN B. RAUM,
Commissioner.

CIRCULAR NO. 205.

Regulations concerning Gaugers' Fees and Expenses.

1879.
Department No. 76. }
Internal Revenue. }

TREASURY DEPARTMENT,
Office of Internal Revenue, Washington, May 17, 1879.

Section 3157, Revised Statutes, provides that "gaugers shall be entitled to receive such fees, to be determined by the quantity gauged, as may be prescribed by the Commissioner of Internal Revenue; and said fees, together with their actual and necessary travelling expenses, shall be verified by their oaths, and shall be paid by the United States monthly."

In accordance with this provision, the following fees, per proof-gallon, are prescribed, to be computed as hereinafter set forth, and, together with the following regulations made in pursuance thereof, are to take effect on and after June 1, 1879:

Fees.

1. For the first twenty (20) gallons each day, five (5) cents per gallon; for the next forty (40) gallons each day, two (2) cents per gallon; for the next two hundred and forty (240) gallons each day, one-half ($\frac{1}{2}$) of a cent per gallon; for the next five hundred (500) gallons each day, one-fifth ($\frac{1}{5}$) of a cent per gallon; all over eight hundred (800) gallons each day, one-eighth ($\frac{1}{8}$) of a cent per gallon. On spirits withdrawn from warehouse of a grain distillery each day during the regular operation of such distillery, the fees will be one-fifth of one cent per gallon.

2. The above rates apply to all spirits entered for deposit into warehouse; to spirits withdrawn from warehouse during regular suspension of distillery; to fruit brandy; to spirits gauged for rectifiers; and to gauging done under special orders of this Office.

3. The compensation of a ganger is by law limited to "five dollars per day while actually employed." The number of proof-gallons gauged by him during the month will be divided by the number of days employed, and the prescribed *per-diem* fees will be allowed for the daily average amount so found to have been gauged, subject to the limitation of five dollars per day.

4. A ganger will be considered as being on duty and employed when he is necessarily travelling on official duty, when on special duty by order of this Office, and when under regular assignment at one or more rectifying establishments and grain distilleries while in operation. When a distillery is under regular suspension the withdrawals from its warehouse should be in charge of a ganger under regular assignment to other duty. A ganger whose sole duty is to superintend the withdrawals of spirits from warehouses of one or more grain distilleries during regular suspension, will be allowed for the days only on which withdrawals are made and the days necessarily employed in traveling in the performance of such duty. A ganger will not be allowed pay for any day during which he was not present at his place of assignment. When no gauging is done on any day for which pay is claimed, the ganger must state in his itemized statement, inside of the account, how he was employed on such day, and before approving such account the Collector must satisfy himself that the ganger is, by reason of assignment and presence for duty, entitled to pay for each day so charged.

5. A ganger who is necessarily employed a considerable portion of his time in travelling, while in the performance of his duties, and whose fees, at the rates herein prescribed, are thus, in the judgment of the Collector, inadequate to reasonably compensate him for the service performed, may be granted a special rate of fees upon a full statement by the Collector of all the facts in each case, showing why special action thereon is deemed necessary and just. This special certificate and recommendation of the Collector must accompany each account in which the above fees are thus deemed inadequate. It is enjoined upon Collectors that they see that gaugers so assigned perform the gauging in their respective divisions in the shortest practicable time, and at as little expense as possible.

6. When, because of the presence of saccharine matter, the hydrometer will not indicate the proof, the computation will be made upon the wine gallons—the wine-gallons being used instead of the proof-gallons—and reported accordingly on Form 108 by the Collector.

Expenses.

7. The actual and necessary travelling expenses incurred by a ganger in the performance of official duty will be allowed. He must make an itemized statement, inside of his account, of all expenses incurred on each day, stating the amount and

character of each item separately. He must state where he starts from *each day*, and name the distillery or distilleries and rectifying establishments visited. The distance between any two or more places visited on the same day must be given, and also the whole distance travelled on each day. When both public and private conveyances are used on the same day, the distances travelled by each should be stated. Every item of expense exceeding one dollar, except for travel by public conveyance, must be attended by its proper voucher. Hotel-bills *must state the time and rate per diem*.

8. If a gauger uses his own horse under the saddle, or his own horse and buggy, he may be allowed to charge for the former not over one dollar per day, and for the latter, one dollar and fifty cents per day, for the days actually and necessarily used when in the performance of his duties, not within the limits of a city or town.

9. In all cases, when practicable, public conveyance should be used. When omnibus or hack-fare is charged, the distance travelled by such conveyance must be stated, otherwise it will not be allowed.

10. When a gauger is assigned to but one place of duty, or to more than one, but all located within the limits of the same city or town, any charges for travelling expenses must be supported by a special certificate of the collector that such expenses were necessary. In other assignments, embracing two or more grain distilleries or rectifying establishments, the gauger is expected to charge only from the one where his services are mostly needed.

11. When it is necessary for a gauger to hire a horse or a horse and buggy for travelling on official duty, he will be expected to do so upon the most favorable terms for the United States, and if obliged to engage it for a number of days in the month, it should be at a reduced rate. Should a gauger disregard this injunction, the amount charged will be reduced to what is considered a reasonable rate. Collectors are enjoined to scrutinize with great care the itemized statement of expenses of each gauger before approving the same.

12. Gaugers will be furnished by the Collector with official envelopes in sufficient quantities to enable them to transmit their reports, without expense for postage.

General Instructions.

13. Each internal-revenue gauger is required to make up his monthly account of fees and expenses *in duplicate*, and forward the same to the Collector for his approval within five days after the expiration of the month in which the fees were earned and the expenses incurred, and accounts delayed beyond that time should be accompanied by an explanation of the cause of the delay. The original, with the necessary vouchers for expenses attached, should be forwarded to the Commissioner within ten days after the expiration of the month for which it is made, and the duplicate retained by the Collector in his office.

14. Each Collector should note on his retained duplicate, Form 108, the date of the transmittal of each of his gaugers' accounts.

15. Each Collector should report on Form 108 all spirits gauged by each gauger, storekeeper and gauger, general storekeeper and gauger, and deputy collector and gauger, *including spirits withdrawn from warehouse*, during the month, noting separately spirits which indicate "no proof" by reason of saccharine matter, and spirits gauged under orders after seizure. Fruit-brandy gauging should be so reported that it may be readily distinguished from other gauging; this may be done by writing opposite each fruit-distiller's name the word "fruit." The number of the distillery should be given.

16. Before approving a gauger's account the collector should see that it agrees, as to quantity gauged, with his report on Form 108. No action towards the adjustment of a gauger's account is taken by this Office until "Form 108" is received, and collectors should therefore forward said report promptly as required by the regulations.

17. Gaugers, in rendering their accounts, should include all gauging of withdrawals during regular suspension with gauging for entry; and the withdrawals during operation of distillery should be entered separately in the lower column of the "Statement" in Form 150.

18. Collectors should also see that each gauger includes in *one* account *all* fees earned and necessary travelling expenses incurred in any one month, and should not approve duplicate bills, or two or more bills for the same period, without orders from this Office.

19. Collectors are reminded that this Office has to rely entirely upon their certificate and reports as to the quantity gauged by each gauger, and, principally, as to the amount of travelling expenses that should be allowed, and, therefore, they should see that no persons are assigned to duty as gaugers unless they are duly commis-

tioned, and before approving gaugers' bills they should satisfy themselves that the same are *duly sworn to and receipted for by the gaugers*; that the fees charged are correctly computed; that the places where the duties have been performed are fully and accurately specified; and that the travelling expenses charged are reasonable, and were necessarily incurred.

20. *Collectors should assign no more gaugers to duty during any one month than are actually necessary, so that the fees and expenses of gauging may be reduced to the lowest practicable amount, and should revoke the assignments of all gaugers not needed for duty, and report the facts to this Office at once.*

21. Gaugers should not assign their accounts, as the drafts in payment thereof will, in all cases, be made payable to the gaugers and sent to the care of the Collector, without regard to any assignments that may be made.

22. No internal-revenue ganger shall charge or receive any sum of money, fee, or compensation of any kind whatever, other than the fee prescribed by the Commissioner of Internal Revenue and paid by the United States, for any cause whatever connected with the performance of his official duties as a United States internal-revenue ganger, under the penalty of removal from office.

23. Internal-revenue gaugers are prohibited from being or becoming interested directly or indirectly in the manufacture, purchase, or sale of tobacco, snuff, or cigars, or in the production, rectification, redistillation, or purchase, or sale of distilled or fermented liquors. They are not prohibited from engaging in any other business, including "free gauging," which will not interfere with the prompt and efficient discharge of the duties of their office.

24. The Commissioner of Internal Revenue is authorized by law to prescribe the fees for gauging, and the rules and regulations relative thereto; and he reserves to himself the right, after any ganger has rendered his account to this office, to investigate it and decide what fees are to be paid for work performed, as shown therein, whenever such special decision is, in his judgment, just and expedient—subject to the limitation prescribed by law.

25. Each internal-revenue ganger should familiarize himself with the above regulations. Strict compliance therewith, in every particular, will facilitate the prompt settlement of his monthly accounts.

All former regulations concerning gaugers' fees and expenses, inconsistent herewith, are hereby revoked.

GREEN B. RAUM,
Commissioner.

NOTE BY THE FIRST COMPTROLLER.—The regulations above quoted remained in force up to June 1, 1880, at which time they were amended, but not as to the fee schedule, by "instructions to internal-revenue officers, June 18, 1880." (Series 7, No. 2—revised.)

IN THE MATTER OF THE CLAIM OF THE STATE OF KANSAS TO FIVE PER CENTUM ON INDIAN RESERVATIONS, AS ON SALES OF "PUBLIC LANDS.—SCHOOL-FUND CASE.

1. The words "public lands" in the fifth clause of section 3 of the act for the admission of Kansas into the Union (12 Stats., 127) apply to all lands occupied as Indian reservations under "Common Indian Title" within the geographical boundary of the State at the time of the passage of the act, notwithstanding said act expressly provided that "all such [Indian reservation] territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas," and that nothing in the State constitution respecting the boundary of the State shall "affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other

- rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed."
2. The Indian reservations in the State of Kansas known as the "Shawnee Absentee," "Miami," "Kansas Trust and Diminished Reserve," "Osage Ceded," "Osage Trust and Diminished Reserve," and "Cherokee Strip," the common Indian title to which was ceded in trust by the Indians to the United States, under treaties made after the admission of the State, in which it was stipulated that the lands therein should be sold, and the net proceeds thereof be invested by the United States for the benefit of the tribes, were before such cession "public lands," and the State is entitled to five per centum of said proceeds.
 3. Without doubt, these treaties, together with subsequent acts of Congress passed to carry out their provisions, entitled the tribes which had conveyed their title to the United States to a sum equal to these net proceeds; but they did not destroy the antecedent right of the State of Kansas to the five per centum which had been granted when the United States, holding the fee in said lands, had capacity to make the grant, and made it without provision for any subsequent limitation.
 4. The lands in the State of Kansas known as the "Kansas Trust" and "New York Indian" reservations were not at the time of the admission of the State "public lands," because the United States had before that time granted the fee thereof to the Indian occupants, and agreed, under treaty stipulations, to sell these reservations for the benefit of those Indians.
 5. The Indians did not hold the lands included in these reservations by a mere right of occupancy. The United States, having granted the fee to said Indians, had thereafter no estate in such lands.
 6. The United States, in effecting the sale of these lands, acted merely in the capacity of an agent. The State of Kansas cannot set up a claim to five per centum of the net proceeds of the sales of these lands.
 7. The lands included within Indian reservations are usually held by the tribes located thereon, by right of permanent occupancy. This right is popularly known as the "Common Indian Title." The Indians have no title in lands of this class other than a mere right of occupancy. The fee is in the United States, subject only to such right of occupancy.
 8. So restricted is the estate of the Indians in such lands that, though they may clear the lands of timber to such an extent as may be reasonable for a profitable use for agriculture, and may sell the timber thus removed, they may not sever timber except for this use. They may not sever it for the purpose exclusively of sale. If they do, the severance is wrongful, and the timber when cut becomes the absolute property of the United States.
 9. Lands held by Indians in reservations by the common Indian title are public lands. They will, therefore, pass, subject only to the Indian right of occupancy, by a grant of public lands by the United States. The possession, when abandoned by the Indian occupants, attaches itself to the fee without further grant. (*United States vs. Cook*, 19 Wall., 591.)
 10. The right of the Indians to dispose of the fee of lands occupied by them under the common Indian title has always been recognized by the courts of the United States from the foundation of the Government. (*Beecher vs. Wetherby*, 95 U. S., 517.)

11. Not only have the courts uniformly decided that lands held by the common Indian title are public lands,* but that they are such has been repeatedly assumed in the legislation of Congress.
12. In the absence of language evincing a different intent, a grant to a State by Congress of five per centum of the proceeds of sales of the public lands within the State will be held to include five per centum of the proceeds of sales of lands held by Indians by the common Indian title.
13. The grant of the five per centum having been made in the act admitting Kansas into the Union, it could not afterwards be revoked. The right of the State became, by the grant, a vested right which Congress could not recall.
14. In the light of the several acts of Congress granting public lands to other States on their admission into the Union, and of the clear provisions of the act for admitting Kansas, it would appear to be doing violence to the terms of the act and to the policy of Congress to construe the five per centum clause as applicable only to lands to which the Indian title had been extinguished prior to the admission of the State.
15. It is assumed, in considering this claim, that the clause in the act for the admission of Kansas which declares that five per centum of the net proceeds of the sales of all public lands lying within said State shall be paid to the State, carried with it an appropriation of that amount. In the acts containing a like provision with respect to sales of public lands in other States, similar clauses have uniformly been held, in the Treasury Department, to contain an appropriation.
16. In revising the statutes the revisers treated these clauses in the acts for the admission of Wisconsin, Minnesota, Oregon, Nevada, and certain other States, as carrying an appropriation; and they incorporated into section 3689 of the Revised Statutes, which establishes "permanent annual appropriations," a provision for the payment to those States of five, three, and two per centum, according to the terms of the respective grants, of the net proceeds of sales of public lands lying within their limits.
17. That section does not, however, include Kansas in the list of States for which an appropriation is therein provided, and it is the only section in those statutes that makes appropriations for payment to States of five, three, or two per centum of the proceeds of the public lands therein.
18. Some of the provisions of the act admitting Kansas into the Union having been incorporated into the Revised Statutes, and that provision of the act which carried an appropriation for the payment to the State of the five per centum of proceeds of sales of public lands in said State having been omitted from the revision: *Held*, That the latter provision was either not affected by the repealing words in section 5596 of the Revised Statutes, or, if repealed, the appropriation has been preserved by other provisions contained in that section and in section 5597 of the Revised Statutes.
19. The reason given in the repealing clause of section 5596 of the Revised Statutes for treating as repealed "all acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision," is, that all other parts of such acts "have been repealed or superseded by subsequent acts," or are "not general

* See *Leavenworth, Lawrence, and Galveston Railroad Company vs. The United States.* (92 U. S., 741, *et seq.*)

and permanent in their nature." The fact, however, in relation to said appropriation clause in the Kansas act is, that it has never been repealed or superseded by any subsequent act.

20. This clause of section 5596, as is seen, contains not only the repeal, but the reason of it. It asserts as such reason the assumed fact that all portions, not included in the Revised Statutes, of acts which have been partially incorporated therein, have either been repealed or superseded by subsequent acts, or are not general and permanent in their nature.
21. It seems clear from this that if a particular section of an act has neither been repealed or superseded by subsequent acts, nor incorporated into the Revised Statutes, and is general and permanent in its nature, it is not within the reason and ground of the repeal, for it has been accidentally overlooked or omitted by the revisers, and therefore it should not be regarded as within the intent and meaning of the repealing clause.

[The following decision by First Comptroller Porter discusses a subject of much interest and importance. It is therefore deemed advisable to give it a place in the present volume.]

DECISION BY A. G. PORTER, *First Comptroller*:

The State of Kansas has presented a claim against the United States amounting to \$190,566.08, being for five per centum on the net proceeds of sales from the 29th of January, 1861, to the 30th of June, 1877, inclusive, of lands within the limits of that State heretofore embraced in Indian reservations. The reservations were known as the Shawnee Absentee, Miami, Kansas Trust, Kansas Trust and Diminished Reserve, Osage Ceded, Osage Trust and Diminished Reserve, New York Indian, and Cherokee Strip. The entire claim has been allowed by the Commissioner of the General Land Office, and the account is now before this office for examination.

The claim is founded upon the fifth clause of section 3 of the act for the admission of Kansas into the Union, approved January 29, 1861. That clause enacts that five per centum of the net proceeds of sales of all public lands lying within said State which shall be sold by Congress after the admission of the State into the Union, after deducting all expenses incident to the same, shall be paid to said State for the purpose of making public roads and internal improvements, or for other purposes, as the legislature shall direct.

The clause is subject to the condition that the State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in the soil to *bona fide* purchasers thereof, and that the State shall never tax the land or property of the United States therein.

The case turns upon a proper answer to be given to the question, what lands were "public lands lying within said State," within the meaning of this clause?

At the date of the passage of the act, there were Indian reservations within the exterior limits of the State, which embraced about 13,800,000 acres. Of these lands, 1,824,000 acres had been assigned to the New York Indians under a stipulation by treaty that the same should never be included within any State or Territory of the Union. Eight hundred thousand acres had been sold in fee to the Cherokee Indians, and formed into a reservation known as the Cherokee neutral lands. They were held under an agreement that they were at no future time, without the consent of the Indian owners, to be included within the territorial limits or jurisdiction of any State or Territory. And 74,937 acres were occupied by the Ottawa tribe of Indians, under an engagement similar to that under which the Cherokee Neutral Lands were held. The two last-mentioned reservations have no connection with this account.

The reservation of the New York Indians was ceded to them by the treaty of January 15, 1838, (7 Stats., 550.) This treaty granted to them in fee-simple 1,824,000 acres of land, being 320 acres for each person, as their numbers were then computed. The grant was made subject to the condition, however, that such of the tribes of the New York Indians as did not agree to remove to the country set apart for their new homes within five years, or such other time as the President might appoint, should forfeit to the United States all interest therein. Only thirty-two of the Indians removed to the reservation and fulfilled the conditions of the treaty. To them were issued certificates of allotment for 10,215.63 acres, which was as nearly 320 acres to each allottee as the location of the allotments would permit. On the 16th of June, 1860, the Secretary of the Interior decided that the remainder of the 1,824,000 acres had been forfeited by the Indians in consequence of their failure to occupy it, and that it was, therefore, still public land. The State has already received five per centum of the proceeds of that part of the forfeited tract which has been sold since the admission of the State. The account under examination applies only to the 10,215.63 acres of their reservation, being the allotted lands above mentioned.

A small part of the Indian reservations in the State at the passage of this act consisted of lands the fee-simple of which, under the provisions of treaties made by the United States with these tribes, belonged to the tribes occupying them.

The rest of the lands included within Indian reservations were held

by the tribes occupying them in the manner in which lands have usually been held by Indians occupying reservations. This title is popularly known as the "Common Indian Title."

In lands of the last-named class, the Indians have no other title than a mere right of occupancy. The fee is in the United States, subject only to such right of occupancy. (*United States vs. Cook*, 19 Wallace, 591.) The possession, when abandoned by the Indian occupants, attaches itself to the fee without further grant. (*Id.*) So restricted is their estate that, though they may clear the lands of timber to such an extent as may be reasonable for a profitable use for agriculture, and may sell the timber thus removed, they may not sever timber except for this use. They may not sever it for the purpose exclusively of sale. If they do, the severance is wrongful, and the timber when cut becomes the absolute property of the United States. (*Id.*)

In the case just cited an action of replevin was maintained by the United States against a purchaser to recover possession of logs thus severed, as having been cut and carried away from public lands of the United States. The court said: "That the United States may maintain an action for cutting and carrying away timber from the public lands was decided in *Cotton vs. The United States*. The principles recognized in that case are decisive of the right to maintain this action." * * * "The United States may at its pleasure dispose of these lands to whomever it may choose, subject only to this right of occupancy." (*Beecher vs. Wetherby*, 95 U. S. Reports, 517.)

The right of the United States to dispose of the fee of lands occupied by Indians under the common Indian title, has always been recognized by the courts of the United States from the foundation of the Government. Thus, a grant of the sixteenth section of the public lands in every township in the State of Wisconsin was held to include whatever became the sixteenth section in every township then embraced in Indian reservations, as such townships and sections should turn out to be, after the Indian occupancy ceased and they had been surveyed. (*Beecher vs. Wetherby*, above cited.)

Not only have the courts uniformly decided that lands held by the common Indian title are public lands, but that they are such has been repeatedly assumed in the legislation of Congress. Two only, among many instances, will be cited.

By a resolution of April 10, 1869, (16 Stats., 55,) provision was made for the sale to actual settlers of land of the Great and Little Osages; and it was also provided that sections 16 and 36 should be reserved for school purposes "in accordance with the provisions of the act of

admission." They were, as part of the "public lands" within the State, and by no other or clearer designation, granted by the act of admission for school purposes.

By an act passed March 2, 1855, entitled "An act to settle certain accounts between the United States and the State of Alabama," the Commissioner of the General Land Office was required to include in the accounts the several reservations under the various treaties with the Chickasaw, Choctaw, and Creek Indians within the limits of Alabama, and allow and pay to that State five per centum thereof as in case of sales; and by an act of March 3, 1857, the Commissioner was also directed to state an account between the United States and each of the other States upon the same principles, and to allow and pay to each State such amount as should thus be found due, estimating all lands and permanent reservations at \$1.25 an acre.

Not only were the reservations mentioned in this act treated as public lands, but a policy seems to have been adopted by Congress of paying to States in which public lands were situate five per centum of the estimated value of such as were contained in reservations, where a considerable period might be expected to elapse before the Indian titles would be extinguished.

Lands, therefore, held by Indians in reservations by the common Indian title are public lands. They will pass, subject only to the Indian right of occupancy, by a grant of public lands by the United States; and in the absence of language evincing a different intent, a grant to a State by Congress of five per centum of the proceeds of sales of the public lands within the State will be held to include five per centum of the proceeds of sales of lands held by Indians by the common Indian title.

There is a provision in the act for the admission of Kansas that nothing contained in the constitution of the State respecting the boundary thereof shall be construed to impair the rights of person or property pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent to make if the act had never passed. This provision evinces no intent on the part of Congress to exclude Indian lands from the list of public lands, five per centum of the net proceeds of which the act directs shall be paid to the State of Kansas for the purposes therein named. It does not say that Indian

lands shall not be held to be public lands within the act; it does not vest in the Indians a title more extensive than they had theretofore possessed; and it precedes the clause which declares that five per centum of the net proceeds of all public lands lying within said State shall be paid to the State for the purposes specified. The provision was meant merely to retain in Congress and the treaty-making power exclusive jurisdiction to make regulations with respect to the property and other rights of Indians within the State without interference by the State. (See opinion of the Attorney-General addressed to the Secretary of the Interior, January 21, 1880.)

The grant of the five per centum having been made, it could not afterwards be revoked. The right of the State became, by the grant, a vested right which Congress could not recall. By treaties, made after the admission of the State with the several tribes who occupied these lands, it was stipulated that the net proceeds of the sales of all but one of the reservations, viz., the Kansas Trust, should be invested by the United States for the benefit of the respective tribes. Without doubt, these treaties, together with subsequent acts of Congress passed to carry out their provisions, entitled these tribes to a sum equal to these net proceeds; but they did not destroy the antecedent right of the State of Kansas to the five per centum which had been granted when the United States, holding the fee in said lands, had capacity to make the grant, and made it without provision for any subsequent limitation.

The disposition of Congress with respect to lands lying within the States, the primary disposal of which belonged to the United States, seems to have grown more and more liberal as new States have been admitted.

Thus, on the admission of Michigan into the Union, seventy-two sections were set apart for the use and support of a university. Previously, upon the admission of new States, thirty-six sections only had been set apart for a like purpose. On the admission since of each successive new State in which there were public lands, seventy-two sections have been set apart for the use of a university.

Prior to the admission of Minnesota one section only in a congressional township had ever been set apart for the use of schools, but on that State becoming a member of the Union, two sections in each township were reserved for schools, and a similar grant has been made, on its admission, to each succeeding new State.

Before the admission of Michigan, four sections had usually been granted for the erection of public buildings at the seat of government. Five sections were given to that State for that purpose, and a like number afterwards to the new State of Iowa.

Subsequently, upon the admission of Wisconsin, Oregon, and Kansas, ten sections were granted for a like use, and twenty subsequently to the States of Nevada, Nebraska, and Colorado.

On the admission of Nevada, twenty sections were granted for the erection of a penitentiary. In previous statutes admitting States no grant had been made for such a use. When Nebraska and Colorado were admitted, fifty sections were granted to each for a like object.

In the light of this legislation and of the clear provisions of the act for admitting Kansas, it would appear to be doing violence to the terms of the act and to the policy of Congress to construe the five per centum clause to be applicable only to lands to which the Indian title had been extinguished prior to the admission of the State.

The gross amount realized from the sale of the eight reservations included in the present account is \$3,866,036.03. The expenses of sale were \$54,714.34. The net proceeds, therefore, are \$3,811,321.69; five per centum of which is \$190,566.08—the amount reported to this office by the Commissioner of the General Land Office as owing to the State. But from this sum must be deducted five per centum of the net proceeds of the sale of the New York Indian reservation. The Indians did not hold the lands included in this reservation by a mere right of occupancy. The lands were not public lands, because the United States, before the admission of the State, had granted the fee to said Indians, and had thenceforth no further estate in them. The United States, in effecting the sale of these lands, acted merely in the capacity of an agent. The State of Kansas cannot set up a claim to five per centum of the net proceeds of the sales of these lands.

There must also be deducted from the sum allowed by the Commissioner five per centum of the net proceeds of the sales of the Kansas Trust reservation. Before the admission of Kansas, the United States engaged by treaty that, when these lands should be sold, the proceeds of the sale should be paid to the Indian occupants. From the time that this engagement was made, the United States became a trustee, holding merely a naked legal title, the beneficial interest being in the Indians. The lands then ceased to be public lands.

The net proceeds of the sale of the New York Indian lands were \$3,956.73, five per centum of which is \$197.84. The net proceeds of the sale of the Kansas Trust reservation were \$1,999.48, five per centum of which is \$99.97. This sum, together with the five per centum upon the net proceeds of the sales of the New York reservation, being deducted from the amount found due the State by the Commissioner of the General Land Office, a balance remains of \$190,268.27, which amount I find to be due the State of Kansas upon this account.

It has been assumed, in considering this claim, that the clause in the act for the admission of Kansas which declares that five per centum of the net proceeds of the sales of all public lands lying within said State shall be paid to the State, carried with it an appropriation of that amount. In the acts containing a like provision with respect to sales of public lands in other States, the clause has uniformly been held, in the Treasury Department, to contain an appropriation. Section 3689 of the Revised Statutes, which establishes permanent annual appropriations for the payment to certain States of five per centum of the net proceeds of sales of public lands lying within their limits, treats clauses in the acts for the admission of Wisconsin, Minnesota, Oregon, and Nevada, expressed in precisely the same terms, as carrying an appropriation. That section does not, however, include Kansas in the list of States for which an appropriation is there provided, and it is the only section in those statutes that makes appropriations for payment to States of five per centum of the proceeds of the public lands therein.

The act for the admission of Kansas does not seem to have entirely escaped the notice of the revisers, for the substance of some of its provisions have been incorporated into their revision.

A question might, therefore, arise whether the five per centum appropriation in the Kansas act is not repealed by the first clause of section 5596 of said revision. The two sections that are relevant to the question are as follows:

"SEC. 5596. All acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided*, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day no part of which are embraced in said revision, shall not be affected or changed by its enactment.

"SEC. 5597. The repeal of the several acts embraced in said revision, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner, as if said repeal had not been made; nor shall said repeal, in any manner affect the right to any office, or change the term or tenure thereof."

It will be observed that the reason given in the first section for treat-

ing as repealed all acts of Congress passed prior to December 1, 1873, any portion of which is embodied in any section of said revision, is, that all parts of such acts have been repealed or superseded by subsequent acts or are not general and permanent in their nature. The fact, however, in relation to said appropriation clause in the Kansas act is, that it has never been repealed or superseded by any subsequent act. In a letter written on the 24th of November, 1877, by Chief-Justice Waite to Mr. Middleton, late clerk of the Supreme Court of the United States, and by the latter filed in this office, the Chief-Justice, after quoting section 5596, says:

"This clause, as is seen, contains not only the repeal but the reason of it. It asserts as such reason the assumed fact that all portions, not included in the Revised Statutes, of acts which have been partially incorporated therein, either have been repealed or superseded by subsequent acts, or are not general and permanent in their nature. It seems clear from this that if a particular section of an act has neither been repealed or superseded by subsequent acts, nor incorporated into the Revised Statutes, and is general and permanent in its nature, it is not within the reason and ground of the repeal, but has been accidentally overlooked or omitted by the revisers and should not be regarded as within the intent and meaning of the repealing clause."

The Chief-Justice adds that, in an informal manner, he had consulted his brethren upon the matter, and that they concurred with him in this opinion.

Upon the back of the letter is an indorsement made by the Secretary of the Treasury in the following words:

"Upon the clear opinion of the Chief-Justice, concurred in, as it seems, by his associates, I think you [First Comptroller T ayl er] will be entirely justified in acting upon his construction of the law in passing the accounts referred to. Other omissions in the Revised Statutes covered by the same reasoning have been called to my attention, and, without seeking to strengthen the opinion of the Chief-Justice, I only express my concurrence in it."

I feel justified by these opinions, from sources so authoritative, in concluding that, if the five per centum appropriation in the Kansas act was not preserved by other clauses in the sections above quoted, as I am strongly inclined to think it was, it was at any rate not repealed by the first clause of the first of said sections.

But section 5 of the act approved June 20, 1874, (18 Stats., 110,) directs the Secretary of the Treasury to cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury. And the Secretary of the Treasury, on the 20th of April, 1877, decided that the appropriations contained in section 368⁹, Revised Statutes, came within the operation of this act.

As the amount owing to the State was not ascertained to be due within two fiscal years since the claim accrued, the appropriation from which it would properly be payable has, therefore, been covered into the Treasury.

The fourth section of the act approved June 14, 1878, makes it the duty of the several accounting officers of the Treasury to continue to receive, examine, and consider the justice and validity of all claims under appropriations the balances of which have been exhausted or carried to the surplus fund that may be brought before them within a period of five years. And the Secretary of the Treasury is, by the act, directed to report the amount due each claimant, at the commencement of each session, to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration.

The amount ascertained to be due the State of Kansas on the account under examination will, therefore, be reported to the Secretary of the Treasury, under the provisions of the last-mentioned act.

TREASURY DEPARTMENT,

First Comptroller's Office, May 6, 1880.

NOTE BY WILLIAM LAWRENCE, *First Comptroller*.—The question, whether the greater portion of the lands referred to in the above decision were "public lands," within the meaning of these words as used in the statute which granted certain sections of public land to the State of Kansas for the purpose of aiding in the construction of a railroad, was discussed in the case of *Leavenworth, Lawrence, and Galveston Railroad Company vs. United States*, (92 U. S., 741,) decided at the October term, 1875, of the Supreme Court. (See *Holden vs. Joy*, 17 Wallace, 211.)

Pursuant to the decision in *Kansas case*, (*ante*, 301, 327,) a portion of the balance found due in the above case was withheld from the State, June 24, 1881, and paid to the United States Treasurer, as a set off on account of direct tax levied under the act of August 5, 1861, (12 Stats., 292,) the payment of which had been assumed by the State.

IN THE MATTER OF THE EFFECT OF A RESOLUTION OF THE SENATE DIRECTING PAYMENT OF COMPENSATION TO CLERKS OF COMMITTEES FOR A PERIOD IN WHICH NO COMMITTEES WERE ORGANIZED.—SPECIAL-SESSION CASE. (*Ante*, 78.)

Questions similar to some of those decided in the Special-Session Case, *ante*, 78, were presented to the accounting officers in 1857.

The Clerk of the House of Representatives in that year paid, from the contingent fund of the House, sundry items of expense for "additional services" and as "extra allowances" to clerks and employés of the House in part under a resolution of that body, and in part by direction of the Committee on Accounts. The Secretary of the Treasury, in his annual report of December 8, 1857, referring to these payments, said :

"A portion of these payments were made under resolutions of the House, directing the Clerk to make them. The others were made under the direction of the Committee of Accounts of the House; all of them were made out of the contingent fund of the House. Upon this statement of facts, the question arises, shall the Clerk be allowed credit for them by the accounting officers of the Treasury in the settlement of his accounts? As a general rule, each House of Congress has the entire control and direction of its contingent fund, and their officers should be allowed credit for such payments as they may make in compliance with the orders of their respective Houses. When, however, a case arises where the contingent fund has been appropriated to a purpose in violation of the law, it is the duty of the accounting officers of the Treasury to arrest its payment to the extent of refusing a credit for it in settlement of the accounts of the officer. Was the House authorized, either by resolution or through its recognized organ, the Committee of Accounts, to allow the foregoing sums to be paid out of its contingent fund? The fact is admitted that each of these payments was made to a clerk or employé of the House as 'extra allowance' to such officer for services rendered by him in his official capacity. Is there any law which prevents this from being done?

"The joint resolution of July 20, 1854, provided that the usual 'extra compensation' should not thereafter be allowed to the officers who received the benefit of that law in the increase of their salaries. The term 'usual extra compensation,' as here used, referred to the extra pay which, for a number of years, had been voted to the clerks and employés of the Senate and House by resolutions of those bodies. It is not pretended that the payments now made by the Clerk were of that character, and I do not think, therefore, that this joint resolution applies to these cases.

"My attention has been called to the several acts of March 3, 1839; August 23, 1842; August 26, 1842; September 30, 1850; and August

31, 1852. The object of these laws was to prevent extra allowance to any and all officers of the Government who were in the receipt of regular and fixed salaries. They have been construed by the practice of the Government not to interfere with the power of the two Houses of Congress over their contingent fund. This construction is based upon the fact that the terms of these different laws do not, in specific language, include the officers of Congress, and contain no express limitation upon the power of the Houses over their contingent fund. In the view which I propose to take of another provision of law, which, in my judgment, must control the decision of this question, it becomes unnecessary for me to review the practice of the Department under the various acts I have cited, and I therefore pass from their consideration without expressing any opinion upon their applicability to the present case.

"The act of March 3, 1845, which was 'An act making appropriation for the civil and diplomatic expenses of the Government for the year ending the thirtieth June, eighteen hundred and forty-six, and for other purposes,' provides, in the second section of the act, 'that no part of the appropriations which may be made for the contingent expenses of either House of Congress shall be applied to any other than the ordinary expenses of the Senate and House of Representatives, respectively, nor as extra allowance to any clerk, messenger, or attendant of the said two Houses, or either of them, nor as payment or compensation to any clerk, messenger, or other attendant [to] be so employed by a resolution of one of said Houses, nor in the purchase of books to be distributed to Members.' The language of this law is plain, positive, and unequivocal, and, if in force, forbids in express terms the allowance which has been paid in the cases under consideration. If this law is held to be in existence, then the accounting officers of the Treasury should refuse to allow credit to disbursing officers, both of the Senate and House, for any payment made by them *out of the contingent fund*, either for extra allowance to any clerk, messenger, or attendant of either House, or 'for payment or compensation to any clerk, messenger, or attendant employed by a resolution of one of said Houses.' The only question for the consideration of the Department is the one suggested above. Is the second section of the act of March 3, 1845, in force ?

* * * * *

"My opinion, then, is, that the second section of the act of 1845 was intended to be permanent and not temporary ; that it is now in force, and must be applied by the accounting officers of the Treasury to all cases coming within its provisions.

"The only additional reason which has been suggested for a different construction is the fact that a different rule has been acted upon both in Congress and in this Department. I admit the force of this suggestion, and feel great reluctance in overruling a practice that has continued for so many years.

"If I could find any evidence that the question had been the subject of serious consideration, and an opinion pronounced formally upon it and acquiesced in, I should hesitate long before resorting to a new construction of the law. But such is not the case ; and I am so fully impressed with the wisdom of the law, and the clearly expressed purpose of Congress to make it permanent, that I must require its enforcement."

. UTAH CASE. (*Ante*, 559, 562.)

In this case it was said (*ante*, 562) that an order of the Secretary of the Treasury "which fixes the amount of salary" of an officer "is not merely an "instruction; it is a regulation, a rule, which has the force of law."

The opinion thus expressed and the authorities then cited are supplemented and confirmed by others. Thus it is said: "There is a material distinction between *authority* and *instructions*." (1 Parsons, Cont., 6th ed., 41.)

In *Hatch vs. Taylor*, 10 New Hampshire, 538, the court discussed the law of agency, and said: "There may be, at all times, upon the constitution of a special agency, and there often is, not only an *authority* given to the agent, in virtue of which he is to do the act proposed, but also certain *communications* addressed to the private ear of the agent, although they relate to the manner in which the authority is to be executed, and are intended as a guide to direct its execution." (See *Berthold vs. Goldsmith*, 24 How., 536.) This recognizes the clear distinction between an instruction, and that which is given as a public law, authority, public rule of duty, or regulation.

APPENDIX.

ORGANIZATION

OF THE

OFFICE OF THE SECRETARY OF THE TREASURY.

JULY 1, 1877.

ORGANIZATION

OF THE

OFFICE OF THE SECRETARY OF THE TREASURY.

The Secretary of the Treasury has authority to "prescribe regulations not inconsistent with law for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." (Rev. Stats., 161.) He is authorized to employ in his Department such number of clerks and other employés as may be appropriated for by Congress from year to year. (Rev. Stats., 169.) He has various general powers in the performance of all services relating to the Department. (Rev. Stats., 245-267.) By virtue of his authority thus given, and the incidental power arising therefrom, the Secretary could have organized the office of the Secretary of the Treasury.

The act of March 3, 1875, (18 Stats., 396,) establishes the office of the Secretary, and provides for it various officers and employés. For the effective performance of the duties of the office the Secretary issued a circular, by which the work of the office was distributed and the divisions thereof designated.

The following is the circular as then issued, except that the supervision of the Revenue-Marine Service has been since transferred from the Assistant Secretary first named therein to the Assistant Secretary immediately thereafter named, and the names of the present officers are given instead of those in office in June, 1877, to wit:

C I R C U L A R .

TREASURY DEPARTMENT,

Washington, June 11, 1877.

From and after the 1st day of July, 1877, the distribution of the work of the Secretary's office will be as follows, and the several divisions will be designated as hereinafter stated:

ASSISTANT SECRETARY—HON. J. C. NEW.

The general supervision of all the work herein assigned to the Divisions of Appointments; Public Moneys; Stationery, Printing, and

Blanks; Loans and Currency; Bureau of Engraving and Printing; and Office of the Director of the Mint.

The signing of all letters and papers as Assistant Secretary, or "by order of the Secretary," relating to the business of the foregoing divisions and bureau, that do not by law require the signature of the Secretary of the Treasury.

The performance of such other duties as may be prescribed by the Secretary, or by law.

ASSISTANT SECRETARY—HON. H. F. FRENCH.

The general supervision of all the work herein assigned to the Divisions of Customs; Special Agents; Internal Revenue and Navigation; Revenue-Marine; Warrants, Estimates, and Appropriations; and to the Offices of Supervising Architect; Supervising Surgeon-General of Marine Hospitals; Bureau of Statistics; and Supervising Inspector-General of Steamboats.

The signing of all letters and papers as Assistant Secretary, or "by order of the Secretary," relating to the business of the foregoing divisions that do not by law require the signature of the Secretary of the Treasury, and the signing, instead of the Secretary, of certain warrants under section 246 of the Revised Statutes.

The performance of such other duties as may be prescribed by the Secretary, or by law.

CHIEF CLERK—AMOS WEBSTER.

The supervision, under the immediate direction of the Secretary and Assistant Secretaries, of the duties of the clerks and employes connected with the Department.

The superintendence and custody of all buildings or parts of buildings occupied by the Treasury Department in this city, and supervision over the force which is in any way connected with the care of them; the transmission of the mails between the Department and Post Office; the care of all horses, wagons, and carriages employed in the transaction of Departmental business; and the direction of those persons employed as engineers, machinists, firemen, or laborers, who are paid from the appropriation for contingent expenses of the Department.

The expenditure of the appropriations for contingent expenses of the Treasury Department; for furniture and repairs of same for public buildings under control of the Treasury Department; for fuel, lights, water, and miscellaneous items for public buildings under the control

of the Treasury Department; the keeping of the accounts of said expenditures and the preparation of all reports relating thereto, the supervision of the accounts of the custodians of public buildings, and the keeping of an account of all property in buildings under the control of the Treasury Department.

The distribution of the mail; the custody of the records and files and library of the Secretary's office, the answering of calls from Congress, other Departments, the Court of Claims, and elsewhere, for copies of papers, records, &c.

The compilation and publication of the monthly digest of circulars and decisions of the Secretary.

Supervision of all the official correspondence of the Secretary's office, so far as to see that it is expressed in correct and official form; the enforcement of the general regulations of the Department, and the charge of all business of the Secretary's office not assigned to some one of the divisions or bureaus attached to the office.

DIVISION OF APPOINTMENTS—CHIEF, JAMES B. BUTLER.

The supervision of all matters relating to the appointment, removal, promotion, or suspension of the officers, clerks, messengers, &c., under the control of the Treasury Department, and the custody of papers pertaining thereto; including the examination of applications and recommendations for appointment or employment, and the preparation of commissions therefor; the examination and investigation of all complaints and charges against officials or employés, except when such investigation is otherwise specially directed; the preparation of reports required by law to be laid before Congress by the Secretary of the Treasury, relative to the employment and compensation of persons in various branches of the public service; and the preparation and publication of the "United States Treasury Register."

The verification of all pay-rolls of the Department and all vouchers for salaries of steamboat inspectors, custodians, and janitors; the inspection of the accounts of internal-revenue gaugers; and the examination of all estimates for salaries and compensation of officers and employés, and of incidental expenses payable from the appropriation for collecting the customs revenue and keeping account thereof.

The keeping account of absence from duty of employés in the several bureaus and offices of the Department, and the consideration of requests for leave of absence.

**DIVISION OF WARRANTS, ESTIMATES, AND APPROPRIATIONS — CHIEF,
W. F. MACLENNAN.**

The issue of all warrants for the receipt and payment of public moneys, and of appropriation and surplus-fund warrants.

The preparation and keeping of all appropriation, sinking-fund, public-debt, and Pacific Railroad accounts.

The compilation and publication, for the use of Congress, of the annual estimates of appropriations required for the service of all departments of the Government, and of the digest of appropriations made at each session of Congress, with the designation of titles under which funds may be drawn from appropriations.

The preparation of the statements of the annual receipts and expenditures of the Government, and of the tables accompanying the annual report of the Secretary of the Treasury.

The publication of the monthly statements of the public debt, and the preparation of the daily statement showing the financial condition of the Treasury.

The preparation of statistical tables relating to the finances, embracing all information connected with the receipts and expenditures of the Government from its foundation to the present time; and, generally, all matters connected with the foregoing.

DIVISION OF PUBLIC MONEYS—CHIEF, E. B. DASKAM.

The supervision of the several Independent-Treasury offices, the designation of national-bank and other depositaries, and the obtaining from them of proper securities.

The keeping of a general account of receipts into the Treasury, the classification of such receipts, and the preparation of lists thereof on which to issue covering warrants.

The directing of all public officers, except postmasters, as to the deposit of the public moneys collected by them.

The issue and enforcement of regulations governing Independent-Treasury offices, and the several depositaries and public disbursing officers, in the safe-keeping and disbursement of public moneys intrusted to them.

The supervision of the business pertaining to "outstanding liabilities," the issue and payment of duplicate checks, the transportation of public moneys and securities, and expenses thereof, and the expenses of the Independent-Treasury offices.

The care and final disposition of moneys arising from fines, penalties, and forfeitures under the internal-revenue laws.

The direction for special transfers of public moneys; and, generally, all matters pertaining to the foregoing.

DIVISION OF CUSTOMS—CHIEF, H. B. JAMES.

The examination of all questions arising under the tariff laws, upon appeals from decisions of collectors of customs, involving the rates and amount of duties on imports; the consideration of cases involving errors in invoices and entries; refund and abatement of duties; drawback of customs duties on articles manufactured in the United States out of imported material, and establishing the rates of drawback.

The consideration of all questions arising upon the construction of the customs laws, and the general regulations thereunder, in regard to the entry, appraisal, and delivery of merchandise, and payment of duties thereon; correspondence with consular officers, through the Department of State, in regard to dutiable values, invoices, &c.; supervision of appraisers in securing uniformity of valuation of dutiable merchandise at the various ports; and compromises in customs cases.

Supervision of the seal-fisheries in Alaska, and such other matters in that Territory as are placed by law in charge of the Secretary of the Treasury.

DIVISION OF INTERNAL REVENUE AND NAVIGATION—CHIEF, D. LYMAN.

The examination of petitions for the remission of fines, penalties, and forfeitures, under the customs, internal-revenue, navigation and steamboat-inspection laws, and applications for compromise of claims in favor of the United States, except customs cases.

All internal-revenue business coming before this office except such as relates to appointments.

The examination of questions relating to the marine documents, entry, clearance, hypothecation, and admeasurement and tonnage of vessels, tax on tonnage, fees for the services of revenue officers, and the transportation of merchandise in vessels; and, generally, all business connected with the foregoing.

DIVISION OF LOANS AND CURRENCY—CHIEF, WM. FLETCHER.

The supervision of the details of all matters pertaining to loans and the issue and redemption of United States bonds;—including the details of negotiating United States interest-bearing securities; the preparation of orders for engraving and printing United States bonds; the original issue and delivery of bonds; the preparation and distribution of circulars designating bonds for redemption; the counting, cancellation, and record of bonds received for redemption; the cancella-

tion and record of coupon bonds received for exchange for registered stock, and the preparation of vouchers for the issue of registered bonds; the examination and record of transfers of registered United States securities; notice of caveats filed against United States securities alleged to be destroyed, lost, or stolen, and, in connection therewith, the procuring of evidence for the courts and law officers of the Department, and, in cases of re-issue, the securing of the requisite indemnity for the Government; the record of issues of gold and currency certificates, and their cancellation upon redemption; and the receipt, counting, cancellation, record, and destruction of redeemed District of Columbia securities.

The supervision of all matters under the immediate charge of the Secretary of the Treasury relating to the counting, cancellation, record, and destruction of all redeemed and mutilated United States notes and fractional currency, and internal-revenue stamps redeemed or mutilated in printing.

The charge of the distinctive paper for United States notes, bonds, and currency;—embracing its receipt from the superintendent at the manufactory; its issue upon proper requisitions; the keeping of accounts thereof with the superintendent at the manufactory, the Bureau of Engraving and Printing, the various bank-note companies, the Comptroller of the Currency, the Treasurer of the United States, and the Register of the Treasury, and other necessary accounts to show the disposition of said paper from the time of its manufacture until its final destruction as redeemed money and securities, or mutilations; a similar account of all paper used for internal-revenue stamps from the time of its receipt by the superintendent at the manufactory until its delivery to the Commissioner of Internal Revenue in stamps; and, generally, all business relating to the foregoing.

DIVISION OF REVENUE MARINE—CHIEF, E. W. CLARK.

The management of the Revenue-Marine Service;—including the supervision of the building and equipment of revenue vessels, their repair, purchase, and sale; the assignment of cruising grounds; the assignment of officers to vessels; the purchase of outfits and supplies; the regulation of the complements of crews and their wages; the examination and certification of revenue-vessels' pay-rolls, and accounts of disbursements on account of the service by collectors of customs; the examination of the property accounts of officers; the preparation and enforcement of regulations for the examination, admission, and government of Revenue-Marine cadets; the preparation and enforcement of general regulations for the government of the service, &c.

The examination of all matters pertaining to the Light-House Establishment, placed by law in charge of the Secretary of the Treasury.

The examination of all matters relating to the United States Coast Survey coming before the Secretary. The charge of all matters relating to weights and measures upon which the Secretary is required by law to act.

The general superintendence of the Life-Saving Service;—embracing the supervision of the establishment of life-saving and life-boat stations, and houses of refuge; the selection of sites for the same, and the procurement of titles thereto; the preparation of plans and specifications for buildings; the making of contracts for their construction; the testing, selection, and purchase of their apparatus, equipment, and supplies; the organization of the service, and the preparation of regulations for the government of its officers and employés; the employment of crews and the regulation of their wages; the supervision of all expenditures and accounts connected with the service, and the general management of the service; the award of medals for the saving of life from the perils of the sea; the collection of statistics of marine disasters; the preparation of the annual report of the expenditures and operations of the Life-Saving Service, as required by law; and, generally, all business of the office connected with the foregoing subjects, except appointments.

DIVISION OF STATIONERY, PRINTING, AND BLANKS—CHIEF, A. L. STURTEVANT.

The purchase and supply of stationery for the Department, Sub-Treasuries, Depositories, United States Mints, Custom-houses, Revenue Vessels, Steamboat-Inspection Service, Life-Saving Stations, Marine Hospitals, Light-houses, and Internal-Revenue Offices; and blanks and blank books for the same, except Internal-Revenue Offices.

Supervision over the forms of books and blanks used by customs officers, with a view of securing uniformity in their methods of transacting business, and of the printing, binding, lithographing, and engraving for the Department, except United States bonds and notes, United States currency, national-bank notes, and internal-revenue stamps.

The arrangement for publication and the indexing of the several reports and tables comprising the Finance Report.

The superintendence of the advertising of the Department; the examination and reference to the proper officers of the accounts for such advertising; and the subscription for newspapers and periodicals.

The preparation and delivery to disbursing officers of the Government, of all disbursing checks used by them, except pension checks; the charge and distribution of official postage-stamps for the Department; the custody and distribution of cigar-stamps to officers of the customs; the examination of the accounts of those officers to see that such stamps are properly accounted for; and, generally, all business connected with the foregoing.

DIVISION OF SPECIAL AGENTS -SPECIAL AGENT L. G. MARTIN, IN CHARGE.

The assignment and detail of Special Agents, and the examination of their accounts for compensation and travelling expenses, and the examination and reference of their reports.

The supervision and enforcement of measures for the prevention of smuggling, and frauds on the customs revenue.

Supervision over the customs districts, the acts of customs officers, and the examination of their books, papers, and accounts, with a view of enforcing the customs laws and regulations, correcting and preventing irregularities, and promoting uniformity of methods and securing efficiency in the transaction of the customs business.

Supervision of the transportation of merchandise in bond, including the examination of the reports of collectors of customs at ports of shipment and of arrival; and the investigation of cases arising from alleged irregularities in connection with such transportation.

The examination and approval of bonds for customs warehouses and bonded routes.

The enforcement of the laws and regulations governing the trade with Mexico and Canada, so far as relates to the establishment of bonded routes and mode of transportation.

DISBURSING CLERK—Geo. A. BARTLETT.

The payment of salaries and compensation of the officers and employés in the following-named offices:

Office of the Secretary of the Treasury.

Office of the Second Auditor.

Office of the Supervising Architect.

Office of the Supervising Surgeon-General of Marine Hospitals.

Office of the Supervising Inspector-General of Steam-Vessels.

Division of Loans in the office of the First Auditor.

Division of Loans in the office of the Treasurer.

The payment of the salaries and compensation of temporary clerks in the Department.

Salaries and compensation of Special Agents.

Salaries and compensation of custodians and janitors of all public buildings under the control of the Treasury Department.

Salaries and compensation of all inspectors of steamboats.

The disbursement, upon the order of the Secretary of the Treasury, of such moneys as may be placed in his hands from the following appropriations, together with the keeping and rendering of the necessary accounts connected therewith:

Expenses of collecting the revenue from customs.

Expenses of the Revenue-Cutter Service.

Life-Saving Service, contingent expenses.

Establishment of new life-saving stations.

Vaults, safes, and locks for public buildings.

Plans for public buildings.

Contingent expenses, Independent Treasury.

Contingent expenses, Treasury Department, (eleven appropriations.)

Various appropriations for the erection and repairs of public buildings under the control of the Treasury Department, throughout the country.

Also all other moneys from other appropriations that may be from time to time placed in his charge by the Secretary.

DISBURSING CLERK—THOMAS J. HOBBS.

The payment of the salaries and compensation of the officers and employes in the following-named offices:

Office of the First Comptroller.

Office of the Second Comptroller.

Office of the First Auditor.

Office of the Third Auditor.

Office of the Fourth Auditor.

Office of the Fifth Auditor.

Office of the Treasurer.

Office of the Comptroller of the Currency.

Office of the Commissioner of Customs.

Office of the Commissioner of Internal Revenue.

Office of the Light-House Board.

Office of the Director of the Mint.

Bureau of Statistics.

The disbursement, upon the order of the Secretary of the Treasury, of such moneys as may be placed in his hands from the following appro-

priations, together with the keeping and rendering of the necessary accounts connected therewith:

- Refunding the national debt.
- Services and expenses of the Southern Claims Commission.
- Inquiry into the causes of steam-boiler explosions.
- Treasury building, Washington, D. C.
- Propagation of food-fishes.
- Inquiry respecting food-fishes.
- Illustrations of report respecting food-fishes.
- Repairs and preservation of public buildings.
- Furniture, and repairs of same, for public buildings.
- Fuel, lights, and water for public buildings.
- Heating and hoisting apparatus for public buildings.
- Assessing and collecting internal revenue.
- Punishment for violation of internal-revenue laws.
- Salaries and expenses of supervisors and subordinate officers of internal revenue.
- Stamps, paper, and dies.
- Salaries, Bureau of Engraving and Printing.
- Labor and expenses of engraving and printing.
- Transportation of United States securities.
- Incidental expenses, national currency—office of the Treasurer of United States.

Also all other moneys from other appropriations that may be from time to time placed in his charge by the Secretary.

Each chief of division will be expected to attend strictly to the business of the division of which he has charge, and to abstain from any interference with that assigned to other divisions.

All questions relating to business belonging to two or more divisions will be settled by consultation and arrangement between the chiefs of the divisions interested, and, in case of disagreement, the matter in dispute will be submitted to the Chief Clerk.

OFFICES AND BUREAUS.

All matters of business relating to the offices of the Director of the Mint, the Supervising Inspector-General of Steam-Vessels, the Supervising Architect, the Supervising Surgeon-General of Marine Hospitals, the Bureau of Engraving and Printing, and the Bureau of Statistics, requiring the attention of the Secretary of the Treasury, and all letters for his signature, or that of either of the Assistant Secretaries, relating

thereto, will be prepared in the offices to which they respectively pertain.

The Chief Clerk will superintend the changes made necessary by this order, and will see that its provisions are carried into effect; and he will call the attention of the Secretary to any defects observed in the arrangement, assignment, or performance of the duties herein imposed, with a view to their correction.

Any officer or employé attached to the Secretary's Office must feel at liberty to call on the Secretary and state to him any event, or well-grounded belief on his part, that affects the integrity of the service, or the official conduct of any one employed in it.

JOHN SHERMAN,
Secretary.

H. Ex. Doc. 219—39

PRINCIPAL OFFICERS OF THE TREASURY DEPARTMENT.

Secretary	CHAS. J. FOLGER.
Assistant Secretary	J. C. NEW.
Assistant Secretary	HENRY F. FRENCH.
Chief Clerk	AMOS WEBSTER.
Chief of Division of Appointments.....	James B. Butler.
Assistant Chief	C. S. Trevitt.
Chief of Division of Warrants, Estimates, and Appropriations.....	} W. F. MacLennan.
Assistant Chief	
Chief of Division of Public Moneys	Chas. H. Miller.
Assistant Chief	E. B. Daskam.
Chief of Division of Customs	H. B. James.
Assistant Chief	Thos. B. Sanders.
Chief of Division of Internal Revenue and Navigation	} D. Lyman.
Assistant Chief	
Chief of Division of Loans and Currency.....	H. N. Gasaway.
Assistant Chief	Wm. Fletcher.
Assistant Chief	Chas. E. Coon.
Assistant Chief	Chas. H. Brown.
Chief of Division of Revenue Marine.....	E. W. Clark.
Assistant Chief	W. S. Eaton.
Chief of Division of Stationery, Printing, and Blanks.....	A. L. Sturtevant.
Division of Special Agents	L. G. Martin, in charge.
Records, Files, and Mail, Assistant Chief in charge.....	S. A. Johnson.
Stenographer to the Secretary	Frank Sperry.
Custodian of Treasury Building	Amos Webster.
Disbursing Clerks.....	{ Geo. A. Bartlett.
Chief of the Bureau of Engraving and Printing	
Assistant Chief	Thos. J. Hobbs.
Director of the Mint	O. H. Irish.
Supervising Architect	Thos. J. Sullivan.
Chief Clerk	Horatio C. Burchard.
Supervising Inspector-General of Steamboats	J. G. Hill.
Chief of the Bureau of Statistics	H. G. Jacobs.
Chief Clerk	J. A. Dumont.
Chairman of the Light-House Board	Joseph Nimmo, Jr.
Naval Secretary	Jos. N. Whitney.
Engineer Secretary	Robt. H. Wyman.
Chief Clerk	Commander Geo. Dewey, U. S. N.
Supervising Surgeon-General.....	Major F. U. Farquhar.
First Comptroller	A. B. Johnson.
Deputy First Comptroller	J. B. Hamilton. M. D.
Second Comptroller	Wm. Lawrence.
Deputy Second Comptroller	J. Tarbell.
Commissioner of Customs	W. W. Upton.
Deputy Commissioner of Customs	Jas. S. Delano.
First Auditor	H. C. Johnson.
Deputy First Auditor	H. A. Lockwood.
Second Auditor	R. W. Reynolds.
Deputy Second Auditor	H. K. Leaver.
Third Auditor	Orange Ferris.
Deputy Third Auditor	H. C. Harmon.
Fourth Auditor	E. W. Keightley.
Deputy Fourth Auditor	A. M. Gangewer.
Fifth Auditor	Chas. Beardsley.
Deputy Fifth Auditor	Benj. P. Davis.
Sixth Auditor	De Alva S. Alexander.
Deputy Sixth Auditor	J. B. Mann.
Deputy Sixth Auditor	Jacob H. Ela.
Deputy Sixth Auditor	Robt. F. Crowell.

Treasurer	James Gilfillan.
Assistant Treasurer	A. U. Wyman.
Cashier	J. W. Whelpley.
Chief Clerk	Charles Lyman.
Superintendent National-Bank Redemption Agency	E. O. Graves.
Register	B. K. Bruce.
Assistant Register	Wm. P. Titcomb.
Comptroller of the Currency	John J. Knox.
Deputy Comptroller of the Currency	J. S. Langworthy.
Commissioner of Internal Revenue	Green B. Raum.
Deputy Commissioner of Internal Revenue	H. C. Rogers.
Chief Clerk	W. T. Clark.
Superintendent Coast Survey	J. E. Hilgard.
Assistant in charge of office	

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